Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

WILLIAM JOHN NICHOLAS, M.D.,

Petitioner,

v.

NORTH COLORADO MEDICAL CENTER, INC., a Colorado corporation; and its Governing Board of Directors; Richard H. Stenner, its President; Karl B. Gills, its Executive Vice-President; Alyce Kantner, its former Director of Medical Services; and Pat (Wilson) Kern, its Director of Cardiovascular Services,

Respondents.

On Petition For A Writ Of Certiorari To The Colorado Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is peer review of a physician performed pursuant to Colorado's Professional Review of Health Care Providers' Act (CPRA) which is conducted by a non-profit corporation that leases and operates the only county hospital "state action" for purposes of a claim brought under 42 U.S.C. § 1983?

   a. Is the Colorado Supreme Court's ruling that the CPRA does not create state action for purposes of the Fourteenth Amendment, even though the Act expressly provides that "[t]he use of professional peer review committees is declared to be an extension of the authority of the [state] board of medical examiners," in conflict with decisions of United States Courts of Appeal and the United States Supreme Court?

   b. Is the Colorado Supreme Court's ruling that a county owned hospital leased to a non-profit corporation is a "private hospital" for purposes of the Fourteenth Amendment in conflict with decisions of United States Courts of Appeal and the United States Supreme Court?

2. Does the decision of the Colorado Supreme Court granting 42 U.S.C. §11111(a) immunity to participants in professional peer review based upon summary judgment proceedings, when there are substantial and genuine issues of fact in controversy, conflict with the decisions of federal circuit courts of appeal and the United States Supreme Court?

LIST OF PARTIES

The parties before the Colorado Supreme Court, from which this appeal is taken, were (1) Petitioner William John Nicholas, M.D., the respondent below, and (2) Respondents North Colorado Medical Center, Inc., a Colorado corporation; its Governing Board of Directors; Richard H. Stenner, its President; Karl B. Gills, its Executive Vice-President; Alyce Kantner, its former Director of Medical Services; and Pat (Wilson) Kern, its Director of Cardiovascular Services, the petitioners below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner William John Nicholas, M.D., respectfully prays that a Writ of Certiorari issue to review the final judgment and decision of the Supreme Court of the State of Colorado entered in the above proceedings on August 6, 2001.

OPINIONS BELOW

The final opinion of the Colorado Supreme Court decided June 25, 2001, as Modified on Denial of Rehearing on August 6, 2001, is reported at 27 P.3d 828 and is reprinted in the Appendix hereto, App. 1-37. The August 6, 2001 Order of the Court modifying the June 25, 2001 Opinion, and denying Petitioner's Petition for Rehearing is reprinted in the Appendix hereto, App. 79-80. The Supreme Court reversed an opinion of the Colorado Court of Appeals decided on December 9, 1999, as Modified on Denial of Rehearing, reported at 12 P.3d 280, which is reprinted in the Appendix hereto, App. 38-58. Earlier court decisions involving the same principal parties and arising out of the same facts and transaction include an opinion of the Colorado Supreme Court decided on April 1, 1996, reported at 914 P.2d 902, and of the Colorado Court of Appeals decided February 2, 1995, reported at 902 P.2d 462.

JURISDICTION

Petitioner raised federal claims for relief under 42 U.S.C. § 1983 along with related state claims for relief in Colorado State Court. Petitioner's federal § 1983 and related state claims were dismissed on summary judgment by the trial court, then reinstated by the Colorado Court of Appeals, and finally dismissed by the Colorado Supreme Court. Petitioner's rights under both the United States Constitution and the statutes of the United States were denied by the highest court of Colorado.

The jurisdiction of this Court to review the decision of the Colorado Supreme Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent language of the Fourteenth Amendment of the United States Constitution is:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The pertinent language of 42 U.S.C. § 1983 is:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party

> injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Pertinent language of the *Health Care Quality Improvement Act of 1986*, found at 42 U.S.C. § 11111 through 11115, (HCQIA) is:

> **§ 11111(a) In general**
>
> > **(1) Limitations on damages for professional review actions**
> >
> > If a professional review action . . . of a professional review body meets all the standards specified in section 11112(a) of this title . . .
> >
> > (A) the professional review body,
> >
> > (B) any person acting as a member or staff to the body, * * *
> >
> > (D) any person who participates with or assists the body with respect to the action,
> >
> > shall not be liable in damages under any law of the United States or of any State . . . with respect to the action. The preceding sentence shall not apply to damages under any law of the United States or any State relating to the civil rights of any person or persons, including the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., and the Civil Rights Acts, 42 U.S.C. 1981 et seq. . . .

Pertinent provisions of the *Colorado Professional Review of Health Care Providers Act*, found at C.R.S. § 12-36.5-101 through 203, (CPRA) are:

C.R.S. § 12-36.5-101. Legislative declaration.

(1) The general assembly hereby finds, determines, and declares that the Colorado state board of medical examiners . . . acts for the state in its sovereign capacity to govern . . . discipline, and professional review of persons licensed to practice medicine in this state. . . .

(2) [I]t is necessary and proper that the board of medical examiners exercise its regulatory authority to protect the health, safety, and welfare of the people of this state.

(3) The general assembly recognizes that, in the proper exercise of its authority and responsibilities under this article, the board of medical examiners must, to some extent, replace competition with regulation and that such replacement of competition by regulation particularly with regard to physicians, is related to a legitimate state interest in the protection of the health, safety, and welfare of the people of this state.

C.R.S. § 12-36.5-102. Definitions.

As used in this article (the CPRA), unless the context otherwise requires:

* * *

(3) "Professional review committees" means any committee authorized under the provisions of this article to review and evaluate the professional conduct of and the quality and appropriateness of patient care provided by any physician licensed under article 36 of this title.

* * *

C.R.S. § 12-36.5-103. Use of professional review committees.

(1) The general assembly recognizes that the board of medical examiners while assuming and retaining ultimate authority for . . . discipline . . . in accordance with this article, cannot practically and economically assume responsibility over every single allegation or instance of purported deviation from the standards of quality for the practice of medicine, from the standards of professional conduct, or from the standards of appropriate care and that an attempt to exercise such oversight would result in extraordinary delays in the determination of legitimacy of such allegations and would result in inappropriate and unequal exercise of its authority to . . . discipline physicians. It is therefore the intent of the general assembly that the board of medical examiners utilize and allow professional review committees and governing boards to assist it in meeting its responsibilities . . . under this article.

* * *

(3)(a) The use of professional review committees is declared to be an extension of the authority of the board of medical examiners. . . .

* * *

C.R.S. § 12-36.5-104. Establishment of professional review committees – function.

(1) A professional review committee may be established pursuant to this section to review and evaluate the quality and appropriateness of patient care provided by and the professional conduct of any physician licensed under article 36 of this title.

* * *

(14) A professional review committee or governing board which is constituted and conducts its reviews and activities pursuant to the provisions of this part I [of the CPRA] is declared not to be an unlawful conspiracy in violation of section 6-4-102, C.R.S.

STATEMENT OF THE CASE

In response to this Court's 1988 decision in *Patrick v. Burget*, 486 U.S. 94, 100 L.Ed.2d 83, 108 S.Ct. 1658 (1988), the 1989 Colorado General Assembly enacted the Colorado Professional Review of Health Care Providers Act (CPRA), C.R.S. §§ 12-36.5-101 *et seq.*, effective July 1, 1989. The CPRA created a comprehensive program of *active* State supervision of all physician peer review in Colorado in order to transform such conduct into state governmental activity. This was done to satisfy the state-action doctrine's requirement of active supervision necessary to shield participants in peer review from federal antitrust liability.

However, the CPRA does more than merely provide the "active supervision" required by *Patrick v. Burget*, it

(1) declares that the Colorado State Board of Medical Examiners acts in the State's sovereign capacity to govern, discipline, and professionally review licensed physicians (12-36.5-101(1)), (2) replaces competition with regulation as a legitimate exercise of the State's police power (12-36.5-101(3)), (3) directs the State Board of Medical Examiners to utilize professional review committees to assist in its professional peer review activities (12-36.5-103(1)), (4) authorizes and provides for the selection of those committees (12-36.5-104(1) & (4)(a)), and (5) declares that "[t]he **use of professional review committees is . . . an extension of the authority of the board of medical examiners**" (12-36.5-103(3)(a)). (Emphasis added.) Among other things, the CPRA created the Colorado State Board of Medical Examiners' Committee on Anticompetitive Conduct (CAC) composed of physicians and an antitrust attorney. The CAC was given authority to review the issue of whether final adverse action of a governing board was the result of unreasonable anticompetitive conduct.

Petitioner William John Nicholas, M.D., is a Board Certified Fellow of the American College of Cardiology performing invasive cardiology. He began performing invasive cardiology while enlisted in the United States Army at the Tripler Army Medical Center in Honolulu, Hawaii. In 1989, following the end of his enlistment, he was recruited by a multi-physician medical clinic in Greeley, Colorado. He was granted medical staff privileges at North Colorado Medical Center, the county hospital leased to and operated by Respondent North Colorado Medical Center, Inc., (NCMC).

One of the cardiologist partners of the medical clinic which hired Dr. Nicholas was resentful that the cardiologist partner's friend had not been selected to fill Petitioner's position. Shortly after Dr. Nicholas arrived in Greeley, that cardiologist partner immediately began a campaign to drive Dr. Nicholas out of the community. As a result of that campaign, NCMC initiated peer review proceedings which resulted in unfavorable recommendations regarding Dr. Nicholas from an investigative subcommittee of NCMC's Board of Directors. On December 19, 1991, Dr. Nicholas requested a Fair Hearing under NCMC's Corrective Action/Fair Hearing Plan. Following an evidentiary hearing in March of 1992, the Fair Hearing Panel recommended that Dr. Nicholas's privileges be fully restored. (See CAC opinion for supporting facts, at App. 65-72.)

The investigative subcommittee then appealed that recommendation to the Board of Directors. Members of the investigative subcommittee were also members of the Board of Directors. Over the objection of Dr. Nicholas, those investigative members refused to recuse themselves from considering the appeal from the Fair Hearing Panel, even though there were a sufficient number of other Board Members available to hear any appeal. In July of 1992, the governing Board of Directors of NCMC rejected the findings and recommendations of the Fair Hearing Panel and instead adopted the findings and recommendations of the investigative subcommittee. The Board of Directors terminated Dr. Nicholas's privileges to practice invasive cardiology in the catheterization laboratory, and placed him on probation with reference to general cardiology privileges. (See CAC opinion for supporting facts, at App. 65-72.) Shortly thereafter, Dr. Nichols was voted

Teacher of the Year by the Third Year Residents participating in the Family Practice Residency Program (R. Vol. 63, Tab 15, p. 110.) The final action of the Board of Directors forced Dr. Nicholas to leave the community to seek other employment.

Pursuant to the CPRA, Dr. Nicholas filed two appeals from the action taken by the governing board: (1) An appeal was taken to the CAC, comprised of four independent Colorado physicians, including two heart specialists, and an antitrust attorney; and (2) An administrative appeal which included a petition for judicial review was filed with the Colorado District Court pursuant to the Colorado Administrative Procedures Act (APA).

NCMC sought to have the Administrative Appeal before the Colorado District Court dismissed on the basis that it was a private hospital and that its actions were not subject to review under Colorado's APA. The District Court ruled that it made no difference whether NCMC was private or public, because the clear import of the CPRA was to make professional review of persons licensed to practice medicine a matter of state control subject to judicial review. (Reprinted at App. 75-76.) The District Court then stayed the Administrative Appeal pending the final decision of the CAC.

Following a hearing in July of 1993, the CAC determined that NCMC's revocation of Dr. Nicholas's privileges was the result of unreasonable anticompetitive conduct. Although it had the option to modify the action taken by the governing board, it chose to set aside NCMC's revocation. The CAC found, *inter alia*, that,

> 18. c. Several circumstances . . . indicate an intent by Medical Center employees to "make a case" against Complainant rather

> than achieve objective quality assurance. (App. 71.)
>
> 20. *Summary*. The Committee therefore finds, by a preponderance of the evidence, that the final action of the Board of Directors of the North Colorado Medical Center resulted from unreasonable anticompetitive conduct. (R. at Vol. 47, Tab 12, pp. 9-10; App. 71.)

NCMC appealed the CAC's decision to the Colorado Court of Appeals and then to the Colorado Supreme Court. Both Colorado courts sustained the decision of the CAC ordering that Dr. Nicholas's privileges be reinstated. The final decision of the Colorado Supreme Court was entered in April of 1996, and shortly thereafter the Administrative Appeal was dismissed on the basis that it had become moot. Although both Colorado Courts refused to grant NCMC's requests to stay the final decision of the CAC, not until June of 1996, after receiving the final decision of the Colorado Supreme Court, did NCMC void the Adverse Action Reports that it had filed against Dr. Nicholas with the National Practitioner Data Bank. (R. Vol. 24, Tab 80, pp. 80-81, and Vol. 25, Tabs 165-8.)

Pursuant to the CPRA, the Colorado State Board of Medical Examiners was required to further review NCMC's adverse action towards Dr. Nicholas. After reviewing the case, a panel of the State Board of Medical Examiners dismissed the inquiry, stating that it "found no reasonable grounds to warrant further action." (Record Vol. 24, Tab 149.)

This suit was filed in July of 1993, alleging that Respondents' conduct in removing Petitioner from the

Hospital deprived Dr. Nicholas of his federal constitutional and statutory rights. The same allegations of facts and occurrences forming the basis of the § 1983 claim also supported several state civil rights claims. The suit further alleged claims based on federal and state antitrust laws. This suit was held in abeyance pending resolution of NCMC's unsuccessful appeals of the decision of the CAC.

The uncontroverted facts are that the hospital operated by NCMC was created by Weld County in the early 1900's as a County Hospital managed or supervised by a statutory Board of Trustees appointed by the County Commissioners. The Home Rule Charter for Weld County provides that the Board of Trustees shall be directly responsible to the Board of County Commissioners. (Record at Vol. 10, p. 2617; App. 81-3.)

On or about November 28, 1984, the Administrator for the County Hospital, and three members of the Board of Trustees filed the initial Articles of Incorporation of the defendant North Colorado Medical Center, Inc., with the Colorado Secretary of State. (R. at Vol. 10, pp. 2623-2625; App. 84-7.) The Articles state that "[t]he specific purposes of the corporation shall be to qualify as an organization exempt from federal income tax under Section 503(c)(3) of the Internal Revenue Code 503(c)(3). . . . " (*Id.* at 2623; App. 84.)

NCMC's initial Articles of Incorporation require that it will qualify as "a tax exempt **public charity** under Section 509(a)(1) of the Internal Revenue Code." (R. at Vol. 10, p. 2623; App. 84-7.) (Emphasis added.) Pursuant to IRS Regulations, the term "charity" includes lessening

of the burdens of Government. (Treasury Regulations § 1.501(c)(3)-1(d)(2).) A corporation formed under that provision of the IRS Code must serve a public interest; **and not a private interest.** (I.R.C. § 503(c)(3), and Treasury Regulations § 1.501(c)(3)-1(d)(1)(ii).)

On August 25, 1987, NCMC's Articles of Incorporation were amended to provide that:

> In the event of dissolution . . . winding up . . . or other liquidation . . . the [NCMC] Board of Directors shall . . . convey and distribute all assets of the corporation to the Board of County Commissioners, County of Weld, State of Colorado. . . . (R. at Vol. 10, p. 2638; App. 91.)

In order to issue public revenue bonds to assist in the expansion of the County Hospital, Weld County leased the Hospital to the Colorado Health Facilities Authority (CHFA), a body politic and corporate created pursuant to C.R.S. § 25-25-104. (App. 117-20, 141-2.) The CHFA, in turn subleased the County Hospital back to Weld County through its Board of Trustees, which in turn, subleased it to NCMC, the non-stock corporation created by the Board of Trustees. This arrangement allowed the CHFA to sell in excess of $80,000,000.00 of tax free public revenue bonds, the proceeds of which were used to enlarge the County Hospital and operate it until it became self-supporting. The County Hospital reverts to the County when the bond obligations are repaid. (App. 123, 125-7.) The lease with NCMC was not let out for public bid; rather, it was an in-house transaction by which NCMC paid no rent other than the amounts necessary to regularly retire any

public indebtedness. (R. at Vol. 6, pp. 1332-1400; App. 115-29, 130-9.)

Following the Colorado Supreme Court's decision affirming the CAC in December of 1997, a jury trial on Petitioner's Third Amended Complaint was scheduled for October 13, 1998. Respondents then moved for summary judgment on the antitrust and § 1983 claims. The trial court granted the motion to dismiss Petitioner's antitrust claims on the basis that "the appeal to the State Committee on Anticompetitive Conduct provides the exclusive remedy for Plaintiff's . . . Claim for Relief." (R. Vol. 11, p. 2970.)

Respondents' motion to dismiss Petitioner's § 1983 claims was based solely on an affidavit that the NCMC hospital corporation was an IRS 503(c)(3) corporation. Notwithstanding the facts demonstrating that NCMC's status was nearly identical to that of the Cushing Municipal Hospital in *Milo v. Cushing Mun. Hosp.*, 861 F.2d 1194 (10th Cir. 1988), where the Tenth Circuit found that leasing a hospital to a private entity will not insulate state actors from § 1983 liability, the motion was sustained by the trial court on a finding that there was no state action because NCMC was a private hospital. That ruling was made by the same trial court which previously ruled that the clear import of the CPRA is to make "professional review of persons licensed to practice medicine a matter of state control." Two subsequent motions to reconsider that ruling were denied by the trial court. Dr. Nicholas moved for summary judgment on the issue of whether Respondent NCMC was a "public hospital, or quasi-public hospital, and in all events a state actor subject to

liability under 42 U.S.C. § 1983." That motion was summarily denied.

Respondents also moved for summary judgment on the basis of their claims of immunity under the provisions of the HCQIA found at 42 U.S.C. § 11111(a). The trial court held a pre-trial immunity hearing on that motion beginning January 26, 1998. Notwithstanding that when the CAC considered the same evidence and found an "intent by Medical Center employees to 'make a case' against Complainant rather than achieve objective quality assurance," and found that "the final action of the Board of Directors of the North Colorado Medical Center resulted from unreasonable anticompetitive conduct," the trial court granted summary judgment in favor of Respondents based on their immunity defenses; dismissing all of Dr. Nicholas's remaining claims for relief. (The CAC's Report is found at R. Vol. 47, Tab 12, pp. 9-10, and is reprinted at App. 71-6.) The final Order of the trial court contained extensive findings and conclusions, but failed to address or even consider the federal *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992), standard for trying and deciding immunity issues under HCQIA. Instead, the trial judge decided all of the controverted factual issues himself, and resolved all the factual and legal issues in Respondents' favor.

Petitioner appealed the decision of the trial court to the Colorado Court of Appeals. The Court of Appeals, reviewing the summary judgment decision *de novo*, reversed the trial court on both counts. It squarely addressed the legislative changes in the CPRA and determined from a plain reading of the statute that Colorado professional peer review had been converted into "state"

conduct. (App. 43-6.) Based on uncontroverted facts in the record it further adjudged *as a matter of law* that Dr. Nicholas's rights guaranteed by the federal Constitution had been violated by the Respondents. (App. pp. 46-50.)

Upon its review of the HCQIA immunity findings of the trial court, the Court of Appeals corrected the trial court's failure to apply the federal *Austin v. McNamara* standard for addressing HCQIA immunity on summary judgment. (App. 50-3.) It applied the *Bryan v. James E. Holmes Medical Center*, 33 F.3d 1318 (11th Cir. 1994), standard for ascertaining whether the acts of an ostensibly private hospital are nevertheless "state action" and determined that there were sufficient facts in controversy to require a jury trial on the merits concerning questions of HCQIA immunity. (App. 51-3.)

The Respondents then obtained a Writ of Certiorari from the Colorado State Supreme Court. On Certiorari, that Court reversed the Court of Appeals' "plain meaning" construction and application of the Colorado CPRA, and declined to construe that statute by noting that "traditionally" the State of Colorado had not engaged in peer review, so inferentially, the legislature had no business getting the State into peer review. The State Supreme Court relied on the United States Supreme Court's ruling in *Lugar v. Edmonson Oil Co., Inc.*, 457 U.S. 922 (1982), concluding that the CPRA could not have changed the traditional law regarding peer review. It wholly disregarded the framework adopted by federal circuit courts, including the Tenth Circuit, for assessing whether NCMC was public or private for purposes of the state action requirement under 42 U.S.C. § 1983. (App. 8-15.) The

State Supreme Court then dismissed Petitioners' remaining claims, failing to enforce federal law and the *Austin v. McNamara* standard for analyzing the Respondents' claims for federal HCQIA immunity.

Specification of the stage in the proceedings, when the federal questions sought to be reviewed were raised, and the manner in which they were passed on.

NCMC's status as a public or quasi-public hospital for purposes of the state action requirement of 42 U.S.C. § 1983 and the issue of whether the CPRA made all peer review in Colorado state action for purposes of 42 U.S.C. § 1983, were first raised in the trial court. (Record Vol. 2, pp. 457-76, *Third Amended Complaint*; R. Vol. 2, pp. 513-559, 534-39; *Plaintiff's Brief in Support of Motion for Partial Summary Judgment*; R. Vol. 5, pp. 1127-1161, 1135-40, *Plaintiff's Brief in Response to Defendants' Motion for Summary Judgment.*) Following the trial court's dismissal of his federally based claims, Petitioner asserted that the dismissal was "inconsistent with and contrary to federal law; and denies the plaintiff procedural and substantive due process of law and equal protection of the law in violation of . . . the Fourteenth Amendment to the Constitution of the United States. (R. V. 10, pp. 2548-85, *Plaintiff's Verified Motion with Authorities to (1) Set Aside the Summary Judgment Dismissing Plaintiff's § 1983 Claims. . . .*)

Petitioner first raised before the trial court the issue of whether the court was obliged to implement on summary judgment the standard adopted by *Bryan v. James E. Holmes Regional Medical Center,* 33 F.3d 1318 (11th Cir. 1994), taken from *Austin v. McNamara,* 979 F.2d 728 (9th

Cir. 1992). (See R. pp. 2435-60, 2442, *Plaintiff's Opening Brief to Conclude the Hearing on Defendants' Immunities Hearing;* R. pp. 2518-44, 2529, *Plaintiff's Response to the Defendant's Opening: Statutory Immunity,* Brief filed March 25, 1998, after the immunity and R. p. 2529.)

The federal issues were raised before both Colorado appellate courts. The Court of Appeals decided the federal issues favorably to Petitioner, and the Supreme Court decided the federal issues unfavorably to Petitioner.

ARGUMENT

I.

The Colorado State Legislature explicitly legislated that professional peer review conducted pursuant to the CPRA constitutes "state action" thereby subjecting hospitals and their governing boards to liability under § 1983.

The Colorado Court of Appeals' opinion correctly observed that "ironically," in transforming peer review in Colorado from traditional non-state activity into active state supervision in order to exempt peer reviewers from federal antitrust liability under the state-action doctrine, the CPRA subjected those same actors to potential § 1983 liability. (App. 45.) The Colorado Supreme Court rejected that holding.

The Colorado Supreme Court held that under federal law, legislative transformation of peer review action into state action to avoid federal antitrust liability does not result in state action which subjects a hospital to § 1983 liability for violation of federally protected rights. In

doing so it relied almost exclusively upon the two prong "fair attribution" test set forth in *Lugar v. Edmonson Oil Co., Inc.*, 457 U.S. 922 (1982). (App. pp. 8, 10-14.) First, was the deprivation caused by the exercise of some right or privilege created by the state, by some rule of conduct imposed by the state, or by a person for whom the state is responsible? Second, is the entity charged with the deprivation a state actor, either by receiving significant aid from state officials, or because the conduct is otherwise chargeable to the state?

Before adopting the *Lugar* analysis, the Colorado Supreme Court first ruled as a matter of law that NCMC was solely a private entity. That finding, which is in conflict with applicable decisions of the federal circuit courts and this Court, is addressed in Argument II below. Based on that finding, the Colorado Court characterized the issue before it as whether the CPRA transformed peer review activities of a hospital which is *privately owned, financed, and operated* into "state action" for purposes of the Fourteenth Amendment. It then applied the public-function doctrine. Even if this Court makes that assumption, and applies the public-function doctrine, the *Lugar* case is still not in point.

The Supreme Court found that the first part of the *Lugar* test was not satisfied because historically peer review was not a state prerogative, private hospitals had a common law right to revoke staff privileges for cause, and the CPRA simply codifies the pre-existing peer review process. The Court relied on *Flagg Bros. v. Brooks*, 436 U.S. 149, 164, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978) for the conclusion that statutory authorization of pre-existing common law does not itself constitute state action.

The *Flagg* case involved foreclosure of a statutory lien for unpaid storage based on rights codified in the state commercial code by a private storage business. This Court found that codification of the lien, alone, did not transform the foreclosure proceeding into governmental activity. Unlike the facts in *Flagg*, the CPRA, expressly provides that the "use of professional review committees is . . . an extension of the authority of the [Colorado] board of medical examiners." § 12-35.6-103(3)(a). The Board of Medical Examiner's authority is the "sovereign capacity to govern licensure, discipline, and professional review" of licensed physicians in the State. § 12-36.5-101(1). The historic use of peer review is only one leg of the public-function test described above, and it is not applicable to, or determinative of, the facts of this case.

The Supreme Court then found that the second part of the *Lugar* test was not satisfied because decisions in the peer review process turn on medical judgments according to professional standards that are not established by the state. *Citing, Blum v. Yarestky*, 457 U.S. 991, 1008, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) and *Rendell-Baker v. Kohn*, 457 U.S. 830, 841, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982).

That application of the *Yaretsky* and *Rendell-Baker* decisions misses this case almost entirely. Petitioner's injury was the result of **due process** violations committed by Respondents, and not the medical judgments of his peer reviewers. The CPRA created a number of procedural safeguards for physicians who are subjected to peer review. The bulk of those safeguards are designed to insure fair notice and a neutral and detached decision maker. Colorado case law and federal law have long

recognized such fundamental rights. *deKoevend v. Board of Education*, 688 P.2d 219 (Colo. 1984). It was the violation of those procedural rights to a fair process which lead the Colorado Court of Appeals to conclude that Dr. Nicholas's constitutional rights had been violated.

Concerning the criterion of whether the CPRA alone makes NCMC a state actor: First, the provisions of the CPRA pre-empt the field of professional peer review of licensed physicians, and declare it to be an extension of state authority. Second, the provisions of the CPRA charge the Board of Directors with the duty to adopt written bylaws, policies and procedures; and to approve written bylaws, policies and procedures for their peer review committees.

The CPRA provisions should be implemented according to the plain meaning of their language. The reasoning employed by the Colorado Supreme Court corrupts the use of the CPRA, using it to shield the peer review process in most hospitals in Colorado from federal liability under § 1983. The Colorado decision gave no heed to the relatively clear intent of the Colorado legislature, that being to include *all* professional peer review in Colorado under the mantle of "state action." That is, adopting the concluding words of the *Patrick v. Burget* decision, *id.* at p. 106, to effectively make Colorado peer review activity the State's own conduct; as opposed to merely codifying existing, passive guides and standards.

The Colorado Supreme Court's decision creates new federal law that the "active state supervision" mandated by *Patrick v. Burget* for an activity to be protected from federal antitrust regulation, can never amount to § 1983

state action. That is inconsistent with federal law. As repeatedly re-affirmed by this Court, every case must be analyzed solely on its facts:

> This Court has never attempted the 'impossible task' of formulating an infallible test for determining whether the State 'in any of its manifestations' has become significantly involved in private discriminations. Only by sifting facts and weighing circumstances on a case-by-case basis can a nonobvious involvement of the State in private conduct be attributed its true significance.

Reitman v. Mulkey, 387 U.S. 369, 378 (1967), and *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

The CPRA legislates that the Colorado State Board of Medical Examiners acts for the State in its sovereign capacity in the professional review and discipline of licensed physicians in the State. The State Board is empowered and directed to utilize professional review committees in hospitals to *assist* in the performance of that State function. It is further legislated that "the use of professional review committees is . . . an extension of the authority of the [state] board of medical examiners." In *Nicholas I*, 902 P.2d 462 (Colo. App. 1995), the Colorado Court of Appeals wrote,

> Here, when performing peer review activities, the governing board of NCMC is clothed with the status of a state agency. See C.R.S. § 12-36.5-103, *Id.* at p. 466.

In this current *Nicholas* case, the Court of Appeals affirmatively decided that the provisions of the CPRA qualified the NCMC Board of Directors as state actors for

the purposes of § 1983. *Nicholas II*, 12 P.3d at pp. 285-286. In reversing the Court of Appeals, the Colorado Supreme Court did not discuss, or hold that determination by the Appeals Court to be in error. Neither did it refer to, or explain, or even mention the CPRA language quoted above. It reversed the finding that professional peer review in a Colorado public or private hospital constitutes § 1983 state action on grounds that are in conflict with decisions of the federal circuit courts and this Court.

II.

In resolving the public/private issue, the Colorado Supreme Court decided an important federal question in disregard of, and in a way that conflicts with, decisions of the Fifth and Tenth Circuit Courts of Appeals.

As pointed out by the Colorado Supreme Court, the analysis of a § 1983 action differs depending on the status of the defendant. In a § 1983 action brought against a state official, the statutory requirement of action "under color of state law" and the "state action" requirement of the Fourteenth Amendment are identical. *Lugar, supra*, at 73 L.Ed.2d 490. The uncontroverted facts in this case demonstrate that NCMC is a state actor for § 1983 purposes. Therefore, whether on not this Court agrees that the CPRA makes all Colorado peer review of physicians state action, Petitioner's § 1983 action should still be reinstated.

The Colorado Supreme Court decided on summary judgment that the Respondent NCMC is a private hospital on a single finding that "the county does not exhibit significant incidents of control over the hospital's internal

affairs." (App. 9-10.) It relied on *Peterson v. Tucson Gen. Hosp., Inc.*, 559 P.2d 186, 189 (Az. App. 1976), a state court decision, as its authority for that conclusion. (App. 9.) The Supreme Court ignored entirely the federal case law which is directly in point on this subject; including, *Milo v. Cushing Mun. Hosp.*, 861 F.2d 1194 (10th Cir. 1988); *Carnes v. Parker*, 922 F.2d 1506, 1509 (10th Cir. 1991); *Jatoi v. Hurst-Euless-Bedford Hosp. Authority*, 807 F.2d 1214 (5th Cir. 1991); and *Moore v. Wyoming Medical Center*, 825 F.Supp. 1531 (D.Wyo. 1993); all of which adopted and followed the principles set forth by this Court in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 6 L.Ed.2d 45, 81 S.Ct. 856 (1961).

The Colorado Supreme Court failed to compare the uncontroverted evidence in this case to federal case law established in its own Tenth Circuit. The facts in this case are nearly identical to those in *Milo* in which the Tenth Circuit found that leasing a city owned hospital and contracting the day-to-day management to a private entity will not insulate the operating-lessee actor from § 1983 liability. 861 F.2d at 1197. In *Milo*, the City of Cushing owned the hospital and leased it to the Cushing Hospital Authority (CHA), a Trust Indenture for the benefit of the City of Cushing, which in turn subleased the hospital to the Masonic Hospital Association, Inc., a private corporation. 861 F.2d at 1195. In this case, Weld County owns the NCMC hospital, and leases it to the Colorado Health Facilities Authority (CFHA), a body politic and corporate of the State of Colorado, which subleases it back to Weld County through its Board of Trustees, which in turn subleases it to Respondent NCMC. (App. 105-8, 115-29, 130-9, 141-2.)

In *Milo*, the City of Cushing participated in the funding, creation, and financial structure of the hospital. 861 F.2d at 1196. In this case, Weld County participated in the funding, creation and financial structure of NCMC. (App. 84-7, 93-7, 105-8, 115-29, 130-9, 141-2.) In *Milo*, the City caused tax free revenue bonds to be issued through the CHA to fund improvements and enlargement of the hospital. 861 F.2d at 1196. In this case, Weld County caused tax free revenue bonds to be issued through the CFHA to fund improvements and enlargement of the hospital. (App. 105-8, 118, 130-9.) Although the Masonic Association in *Milo* was responsible for the operations of the hospital, it was required to utilize its revenues from operations in accordance with the terms of the 1978 Bond Indenture. 861 F.2d at 1196. In this case, while NCMC is responsible for the operation of the hospital, it too is required to utilize its revenues from operations in accordance with the 1985 and 1990 Bond Indentures. (App. 115-29.) In *Milo*, in the event of default under the leasing agreements, neither the bondholders nor the Trustee bank had the authority to sell the hospital. 861 F.2d at 1196. In this case, in the event of default under the leasing agreements, neither the bondholders nor the Trustee identified in the Bond Indenture have the authority to sell the hospital. (App. 96, 105-8, 115-29, 130-9.)

In *Milo*, three City Commissioners were members of the CHA, and two were members of the Masonic Association. 861 F.2d at 1196. In this case, the CFHA is a State entity, and the County appoints all of the members to the Board of Trustees for the hospital. When the peer review

process began in this matter in 1991, the County Commissioner-appointed Board of Trustees made up seven members of the Board of Trustees, thereby constituting a majority of the Board. On December 23, 1991, the Weld County Commissioners consented to the amendment of NCMC's Bylaws to provide that four members of the Corporation's Board of Directors would be members of the County Commissioner-appointed Board of Trustees. (App. 110, 111-2, 113-4, 98-108.)

In addition to those facts, in this case NCMC enjoyed the benefit of not having to pay property taxes on the County Hospital as well as proceeds from Weld County mill levies. (App. 109 and 10.)

It is not coincidental that the facts of these two cases are almost identical. Cities and counties commonly adopt these financially rewarding lease/purchase arrangements which allow private managers access to public facilities and public financing. However, federal circuit courts have uniformly and unanimously ruled that such arrangements will not insulate actors from § 1983 liability. *See, Milo v. Cushing, supra* at 1197 (The defendants cannot escape liability by delegating responsibility to another party.); and *Jatoi v. Hurst-Euless-Bedford Hosp. Authority, supra* at 1221 (The private defendants cannot receive public funds, utilize public facilities, and serve a public purpose, yet insist that their private statute forestalls any correction of a violation of the constitutional rights of their medical staff.).

The Colorado Court found that the County did not exhibit significant control over the hospital. Once again,

federal law does support the conclusion that such a finding is dispositive of the issue before the Court. The County's lease of the hospital to NCMC contains the following reversionary language:

> Section 5.07 . . . [NCMC] . . . will use the Hospital Facilities only as and for a health facility . . . as defined in the [Colorado Health Facilities Authority Act] . . . will not use . . . or suffer or permit . . . to be used in unrelated trade or business. . . . (R. Vol. 10, Tab 15, p. 13264.)
>
> Section 13.02 . . . If any event of default shall occur . . . the [County Board of Trustees and/or CFHA] may terminate this [lease] . . . re-enter and take complete . . . possession. . . . (R. Vol. 10, Tab 15, pp. 13306-7, App. 125-6.)

Based on a reversion clause of precisely the same purport and effect, the Fifth Circuit Court of Appeals held in *Hampton v. City of Jacksonville*, 304 F.2d 320, 322 (5th Cir. 1962) as follows:

> Appellees . . . stress the fact that there is no 'immediate control' [in the lease and operation of two golf courses], and that there is no 'present interest' in the City of Jacksonville. These are empty phrases when considered in connection with the absolute obligation on the part of the present owners that they immediately, presently and always use the leased property for golf course purposes and no other. This is complete present control even though the daily operation is, of course, not subject in other matters to the City's direction. *Id.* at 322.

> We conclude that the inclusion of the reversionary clause in these conveyances constituted the purchasers of the two golf courses state agents, within the purview of the Fourteenth Amendment. *Id.* at 323.

It should be kept in mind that private activity by lessees was held to be "state action" in *Burton v. Wilmington, Milo v. Cushing, Carnes v. Parker,* and *Jatoi v. Hurst-Euless.*

III.

The Colorado Supreme Court refused to apply established federal law, thereby deciding important questions of federal law that conflict with the decisions of the United States Courts of Appeals.

Under the Supremacy Clause, state courts have a duty to adjudicate federally based controversies; and that duty includes fulfillment of the same efforts and mechanics of decision-making as is incumbent on federal courts. *Howlett v. Rose,* 496 U.S. 356, 366-7, 110 S.Ct. 2430, 2437-8 (1990). Those mechanics of decision-making functions include the federal summary judgment standards set forth in *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505 (1986). In this case, the HCQIA immunity either would not have been available, or would have been submitted to a jury had the action been filed in a federal forum.

In considering HCQIA immunity, the Colorado Court of Appeals concluded there was "a genuine issue of material fact whether the defendants violated the procedural requirements of HCQIA, and remanded for further proceedings." *Nicholas III,* 12 P.2d at 287, App. 50-3.

The Colorado Supreme Court, in contrast, ruled that immunity under HCQIA is a question of law for the court to decide. *Nicholas IV*, 27 P.3d at 837, App. 18. The Colorado Court then proceeded to determine *de novo* controverted factual issues in contravention of federal law. Each of the facts relied upon by the Colorado Court is contradicted by the findings of the Court of Appeals, which reviewed the facts *de novo*, and by the Committee on Anticompetitive Conduct which heard testimony first hand. A well respected expert in Colorado health care law, called on behalf of Dr. Nicholas, testified before the trial court that NCMC and its staff failed to comply with due process requirements generally applied by other health care institutions at the time. (R. at Vol. 18-19, pp. 834-980.)

In *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318, 1333-34 (11th Cir. 1994), the standard for summary judgment in regard to immunity was set forth as follows:

> [T]he rebutable presumption of HCQIA section 11112(a) creates an unusual summary judgment standard that can best be expressed as follows: "Might a reasonable jury, viewing the facts in the best light for [the plaintiff], conclude that he has shown, by a preponderance of the evidence, that the defendants' actions are outside the scope of § 11112(a)?"
>
> Of course, motions for summary judgment under Rule 56 bear a close relationship to motions for judgment as a matter of law under Rule 50. Courts frequently apply the

> same standards when ruling on the two motions. . . .
>
> Therefore we adopt the Ninth Circuit's statement of the applicable standard in this case as well: "[O]ur inquiry focuses on whether [Bryan] provided sufficient evidence to permit a jury to find that he ha[d] overcome, by a preponderance of the evidence, the presumption that [the Hospital] would reasonably have believed" that it had met the standards of section 11112(a).
>
> FN28. As the [US] Supreme Court has explained, "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." (Citations omitted.)

It was error for the trial court and Colorado Supreme Court to undertake to resolve all the immunity issues, including genuine issues as to material facts, on pre-trial summary judgment.

CONCLUSION

What occurred in the Colorado decision is reasonably obvious from its opinion. Having ascertained that the litigation had already extended over "a decade" and that returning it for trial could extend the time another year or more, the Colorado Supreme Court decided to end the matter once and for all, irrespective of the rights of the Petitioner. To do that, it overlooked the facts regarding NCMC's status, the plain language of the CPRA, and avoided the issues regarding the fairness of the process.

No attention or analysis was given to the quality of the underlying peer review proceedings. What little federal law was set forth was set forth correctly; but was not in point and was improperly applied to this case. The Colorado Supreme Court failed to consider the federal case law in point, and its opinion is inconsistent with relevant decisions of the federal circuit courts and this Court. Bad federal precedent has been created that should be rectified by this Court.

How can federal law condone (1) dismissal of the independent attorney engaged to advise the Fair Hearing Panel after the hearing was completed, and then directing its general counsel to attend all the deliberations of, and to prepare the final report for, the Fair Hearing Panel, and later each of the appeal panels, (2) the consideration of raw investigation reports as competent factual data equal in probative weight to the facts determined by the "due process" hearing panel, or (3) allowing members of the investigative subcommittee to later serve as decision makers? (*See* findings of the CAC and Court of Appeals, App. 66-9 and App. 48-50.)

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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November 5, 2001.

Supreme Court of Colorado,
En Banc.

NORTH COLORADO MEDICAL CENTER, INC., a Colorado corporation, commonly referred to as NCMC, and its Board of Directors; Richard H. Stenner, its President; Karl B. Gills, its Executive Vice-President; Alyce Kantner, its former Director of Medical Services; Pat (Wilson) Kern, its Director of Cardiovascular Services; and Does 1 through 15, Petitioners,

v.

William John **NICHOLAS,** M.D., Respondent.

No. 00SC418.

June 25, 2001.

As Modified on Denial of Rehearing Aug. 6, 2001.

Law Offices of J.M. Reinan, *Jerome M. Reinan,* Denver, CO, Attorney for Petitioners.

Anthony, Nicholas, Goodrich & Tangeman, LLC, *Philip A. Nicholas, Jason M. Tangeman,* Laramie, WY, Attorneys for Respondent.

Yu Stromberg Cleveland, P.C., Frederick Y. Yu, Denver, CO, Attorney for Amicus Curiae Colorado Health and Hospital Association.

Montgomery Little & McGrew, P.C., *Patrick T. O'Rourke,* Englewood, CO, Attorney for Amicus Curiae Colorado Medical Society.

Justice *HOBBS* delivered the Opinion of the Court.

We granted certiorari to review the court of appeals' decision in *Nicholas v. North Colorado Medical Center, Inc.,*

12 P.3d 280 (Colo.App.1999) (*Nicholas III*).[1] In reversing the trial court's orders for summary judgment, the court of appeals held that the peer review process in a private hospital constitutes state action for the purpose of 42 U.S.C. § 1983. The court of appeals also held that the peer review process did not conform to the requirements of the Colorado Professional Review Act, sections 12-36.5-101 to -203, 4 C.R.S. (2000) (CPRA), and the Health Care Quality Improvement Act, 42 U.S.C. §§ 11101 to 11152 (1995) (HCQIA). We hold that professional peer review conducted in a private medical facility does not constitute state action for the purposes of 42 U.S.C. § 1983. We further hold that the participants in the peer review of Nicholas acted in accordance with the CPRA and HCQIA, and are therefore immune from suit and liability for damages for Nicholas's state contract and tort claims. Accordingly, we reverse the judgment of the court of appeals.

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[1] We granted certiorari on the following issues:

(1) Whether the court of appeals erred in reversing the trial court's dismissal of respondent's claims under 42 U.S.C. § 1983.

(2) Whether the court of appeals erred in ruling that petitioner violated respondent's due process rights.

(3) Whether the court of appeals erred in reversing the trial court's order of summary judgment in favor of petitioner pursuant to the HCQIA and CPRA.

I.

This case returns to us in the latest stage of what has become a decade-long saga of litigation and administrative proceedings. In 1989, respondent William Nicholas, a licensed physician specializing in invasive and interventional cardiology, joined the medical staff of the North Colorado Medical Center (NCMC) in the facility's heart catheterization lab. Shortly after his arrival, NCMC's Department of Medicine Quality Assurance Committee (QA Committee) received reports of problems with Nicholas's practice. The QA Committee was composed of several NCMC staff physicians, none of whom directly competed with Nicholas. Based on initial concerns over inadequate medical chart documentation, the QA Committee began investigating Nicholas's practice. During the course of the investigation, three of Nicholas's patients suffered strokes, one patient died, Nicholas's privileges in the heart catheterization lab were suspended, and Nicholas was terminated from his concurrent employment with another medical facility in the Greeley area.

The QA Committee hired an outside physician, Dr. G. David Jang, to conduct an independent review of Nicholas's medical practice. Jang toured the NCMC facility, met with Nicholas and members of the NCMC staff, and reviewed several of Nicholas's patient charts and cardiac catheterization films. Jang subsequently submitted a report that was critical of Nicholas's practice. The QA Committee furnished Nicholas with a copy of Jang's report, and referred the matter to NCMC's Credentials Subcommittee. Like the QA Committee, the Credentials

Subcommittee was composed primarily of physicians, none of whom was in direct competition with Nicholas.

The Credentials Subcommittee reviewed Jang's report and interviewed Nicholas. In July 1991 the Subcommittee concluded that allowing Nicholas to continue practicing invasive cardiology posed a risk to patient care at NCMC, and directed NCMC's president to suspend Nicholas's invasive cardiology privileges pending further investigation. Continued investigation uncovered further problems with Nicholas's practice. The Credentials Subcommittee issued a Corrective Action Report recommending that Nicholas be retained on the NCMC staff but not be granted privileges to practice invasive cardiology. The Subcommittee provided Nicholas with written notice of adverse action and his right to request a Fair Hearing pursuant to NCMC's bylaws.

In March 1992, Nicholas was afforded a hearing by NCMC's Fair Hearing Panel. The Panel was comprised of three physicians, none of whom was in direct competition with Nicholas or had anything to do with his investigation. The Panel expressed concern over Nicholas's continued documentation deficiencies, and recommended that he be closely supervised and monitored. The Panel did not recommend, however, that Nicholas's privileges be suspended.

Both Nicholas and the Credentials Subcommittee appealed the Panel's decision to NCMC's House Committee of the Board of Directors. The House Committee considered the Fair Hearing Panel report, evidence produced at the hearing, and the Credentials Subcommittee's

Corrective Action Report. The House Committee concluded that Nicholas should be suspended from invasive cardiology privileges and placed on probation for a period not to exceed one year, after which time Nicholas could seek restoration of his invasive cardiology privileges. At a special meeting one week later, NCMC's Board of Directors considered Nicholas's case and ratified the House Committee's recommendations.

In June 1992, Nicholas appealed to the state Committee on Anticompetitive Conduct (CAC), arguing that the suspension of his privileges resulted from unreasonable anti-competitive conduct. Following a hearing, the CAC concluded that Nicholas's loss of privileges was initiated by the hostility and anti-competitive feeling of another NCMC cardiologist, and ordered Nicholas's invasive cardiology privileges reinstated. The CAC's decision was upheld on appeal. *See Nicholas v. North Colo. Med. Ctr., Inc.*, 902 P.2d 462 (Colo.App.1995) (*Nicholas I*), *aff'd, North Colo. Med. Ctr., Inc. v. Committee on Anticompetitive Conduct*, 914 P.2d 902 (Colo.1996) (*Nicholas II*). In 1993, Nicholas applied for and received reinstatement of his Level III cardiology privileges at NCMC.

In addition to filing an appeal with the CAC, Nicholas brought a civil suit against NCMC and certain of its administrators (collectively NCMC), seeking damages as well as declaratory and injunctive relief. After our decision in *Nicholas II*, NCMC filed a motion for summary judgment in the civil suit, asserting in part that Nicholas's claim for damages under 42 U.S.C. § 1983 must fail because NCMC's activities did not constitute state action. NCMC also asserted that Nicholas's state law

claims[2] must be dismissed because NCMC was immune from damages under the CPRA and the HCQIA.

In December 1997, the trial court granted NCMC's motion for summary judgment on the section 1983 issue. The trial court concluded that NCMC was a private corporation and that its actions are not "state action" for the purposes of section 1983. The trial court subsequently held a hearing on the other immunity issues, and granted summary judgment for NCMC on those claims in June 1998.

Nicholas appealed, and the court of appeals reversed each of the summary judgment orders. The court of appeals first held that Nicholas could maintain his section 1983 action, because (1) NCMC is "clothed with the status of a state agency" when performing peer review activities, *Nicholas III*, 12 P.3d at 285, and (2) NCMC's review procedure violated Nicholas's due process right to a fair and impartial determination by the Board. *Id.* at 287. The court of appeals also concluded that NCMC was not immune from state law claims, because NCMC's actions fell or could have fallen outside the scope of the CPRA and the HCQIA. *Id.* at 287, 289.

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[2] Nicholas's Third Amended Complaint set forth fifteen claims for relief: (1) declaratory relief; (2) injunctive relief; (3) negligence; (4) breach of contract; (5) willful breach of contract; (6) defamation; (7) intentional infliction of emotional distress; (8) tortious interference with contract; (9) fraud and misrepresentation; (10) breach of duty of good faith and fair dealing; (11) deprivation of rights under 42 U.S.C. § 1983; (12) anti-competitive conduct; (13) outrageous conduct; (14) abuse of process; and (15) arbitrary, capricious, and unreasonable conduct.

II.

We hold that professional peer review conducted in a private medical facility does not constitute state action for the purposes of 42 U.S.C. § 1983. We further hold that the participants in NCMC's peer review of Nicholas acted in accordance with the CPRA and HCQIA, and are therefore immune from suit and liability for damages for Nicholas's state contract and tort claims. Accordingly, we reverse the judgment of the court of appeals.

A.

Section 1983 Liability

Section 1983 allows a party to bring a cause of action for an alleged violation of the Fourteenth Amendment and provisions of the Bill of Rights incorporated into the Fourteenth Amendment. *See Scott v. Hern*, 216 F.3d 897, 906 (10th Cir.2000). "The purpose of [section] 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992). To be actionable under section 1983, the challenged conduct must satisfy two conditions. First, the conduct must constitute state action; that is, action under color of state law. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 930-31, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). Second, the conduct must deprive the claimant of a federally protected right or interest. *Id.*; *State v. Nieto*, 993 P.2d 493, 507 (Colo.2000).

The trial court held that NCMC's peer review process was not state action, and that consequently, section 1983

was not applicable. The court of appeals determined that NCMC's peer review both constituted state action and deprived Nicholas of property and liberty interests without due process. *Nicholas III*, 12 P.3d at 286-87. We agree with the trial court that NCMC's professional review of Nicholas did not constitute state action.

1. Public vs. Private Entities

Where a section 1983 claim is based on the conduct of a private hospital, the conduct must be "fairly attributable to the state." *Lugar*, 457 U.S. at 937, 102 S.Ct. 2744. A private entity's conduct is fairly attributable to the state only if it meets two criteria: (1) the deprivation is caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible; and (2) the entity charged with the deprivation is fairly said to be a state actor, either by receiving significant aid from state officials, or because the conduct is otherwise chargeable to the state. *Wyatt*, 504 U.S. at 162, 112 S.Ct. 1827; *Lugar*, 457 U.S. at 937, 102 S.Ct. 2744.

Because the tests differ based on public or private status, as an initial matter, we must determine whether NCMC is a public or private entity. Whether a hospital is a public or private facility is a matter of law. *See Monyek v. Parkway Gen. Hosp., Inc.*, 273 So.2d 430, 431 (Fla.Dist.Ct.App.1973); *Hughes v. Good Samaritan Hosp.*, 289 Ky. 123, 158 S.W.2d 159, 160-61 (1942). The trial court held that NCMC is a private medical facility. The court of appeals did not disturb this conclusion on appeal. *See Nicholas III*, 12 P.3d at 286. While Nicholas now urges us

to find that NCMC is a public facility, our review of the undisputed facts in the record leads us to conclude that NCMC is indeed a private hospital as a matter of law for the purpose of section 1983.

"The principal distinguishing feature of a private hospital is that it has the power to manage its own affairs and is not subject to direct control of a governmental agency." *Peterson v. Tucson Gen. Hosp., Inc.*, 114 Ariz. 66, 559 P.2d 186, 189 (Ct.App.1976); 41 C.J.S. *Hospitals* § 1 (1991). Private hospitals are also founded and maintained by private persons or a private corporation. *Van Campen v. Olean Gen. Hosp.*, 210 A.D. 204, 205 N.Y.S. 554, 556 (App.Div.1924). By contrast, a public hospital "is an instrumentality of the state, founded and owned in the public interest, supported by public funds, and governed by those deriving their authority from the state." *Peterson*, 559 P.2d at 189.

The record shows that while originally founded as a county hospital, NCMC was incorporated as a private 501(c)(3) corporation in the mid-1980s. In 1991, prior to the events involving Nicholas, the composition of the hospital's Board of Directors was changed such that only a minority of the directors were appointed by Weld County. The minority of directors that are appointed by the County are entirely independent of the Weld County Board of County Commissioners. The mere presence of public officials on a hospital's board of directors does not by itself render decisions by the hospital state action. *See Crowder v. Conlan*, 740 F.2d 447, 452 (6th Cir.1984).

More important for our inquiry, the record shows that the county does not exhibit significant incidents of

control over the hospital's internal affairs. *See Peterson*, 559 P.2d at 189. NCMC's Board of Directors is not subject to the direction of the Weld County Board of County Commissioners, nor is it required to file reports with the Board of County Commissioners. Moreover, the Board of County Commissioners has no influence over how NCMC handles its hospital credentialing matters. A "sufficient nexus" does not exist between the state's relationship to the hospital and its credentialing and disciplinary procedures. *Lubin v. Crittenden Hosp. Ass'n*, 713 F.2d 414, 416 (8th Cir.1983).

Nor does Weld County's ownership of the land underlying the hospital supply a sufficient nexus to render the hospital a public facility. This factor is not significant where the hospital itself has "full and complete charge of [its] management and operation." *Id.* The governing bodies of NCMC demonstrate the requisite independence from the county to make the hospital a private entity.

2. State Action by a Private Entity

Having concluded that NCMC is a private entity, we must next determine whether its peer review process bears the imprimatur of the government sufficient to constitute state action; that is, whether the state – via statute or another legal mechanism – permitted NCMC to engage in the alleged deprivation of a federal right, and whether NCMC received significant assistance from state officials in creating the alleged deprivation. *Lugar*, 457 U.S. at 937, 102 S.Ct. 2744. We conclude that it does not.

The first prong of the Lugar test requires that the alleged deprivation be caused by the exercise of a state-created right or privilege or by a rule of conduct imposed by the state or by a person for whom the state is responsible. *Id.* Put another way, the defendant "must have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988) (internal quotation marks omitted).

The peer review of Nicholas fails to meet this definition, for two reasons. First, "[p]rofessional peer review at private hospitals has not been viewed as the prerogative of the state." *Berg v. Shapiro*, 948 P.2d 59, 61 (Colo.App.1997). Rather, private hospitals had a right at common law to revoke staff privileges of physicians for good cause. *Id.*; *Wong v. Stripling*, 881 F.2d 200, 202 (5th Cir.1989). Nor does the CPRA's codification of the use of professional review committees, *see* §§ 12-36.5-101 to -105, 4 C.R.S., make the process of professional peer review attributable to the state. Statutory authorization of a prez-existing common law right does not in itself constitute state action. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978).

Second, the initial prong of the Lugar test is not met here because decisions that take place during the peer review process in a private hospital "ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." *Blum v. Yaretsky*, 457 U.S. 991, 1008, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982). The decision to suspend Nicholas's

invasive cardiology privileges was reached through independent criteria, and was "not compelled or even influenced by any state regulation." *Rendell-Baker v. Kohn*, 457 U.S. 830, 841, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982).

The second prong of the Lugar test requires that the party charged with the deprivation is fairly said to be a state actor. *Lugar*, 457 U.S. at 937, 102 S.Ct. 2744. A private entity is a state actor for section 1983 purposes only if there is a "sufficiently close nexus" between the state and the private entity's conduct "so that the action of the latter may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974). Nicholas urges that there is a sufficiently close nexus between the state and NCMC, because the state regulates professional review through the CPRA. We disagree. The CPRA merely provides the procedural format for professional review; it does not set forth the ultimate decision-making criteria. Indeed, the CPRA provides that after a hearing, a professional review committee may make "any recommendations it deems necessary" unless federal laws or regulations provide otherwise. § 12-36.5-104(7)(d).

The Colorado statutes are replete with provisions governing the professions and the delivery of private services to the public. *See, e.g.*, Title 12, 4 C.R.S. (2000). Regulation of a business alone, however, does not itself provide the requisite nexus to create state action, even if that regulation is extensive and detailed. *Jackson*, 419 U.S. at 350, 95 S.Ct. 449; *see also Denver Welfare Rights Org. v. Public Utils. Comm'n*, 190 Colo. 329, 335-37, 547 P.2d 239, 243-45 (1976). Unless the regulation includes specific criteria for evaluation and guidelines as to what action must

be taken and when, even the statutory involvement of the state board of medical examiners or another state agency is insufficient to create a sufficiently close nexus between a private hospital and the state. *See Tunca v. Lutheran Gen. Hosp.*, 844 F.2d 411, 413 (7th Cir.1988); *Ezpeleta v. Sisters of Mercy Health Corp.*, 800 F.2d 119, 122 (7th Cir.1986); *Goss v. Memorial Hosp. Sys.*, 789 F.2d 353, 356 (5th Cir.1986).

The court of appeals did not utilize the test stated in *Lugar* and its progeny in determining whether NCMC was a state actor; rather, the court of appeals concluded that because the CPRA qualifies the peer review process as "state action" exempt from liability under the Sherman Antitrust Act, it also makes peer review "state action" for the purposes of section 1983. *See Nicholas III*, 12 P.3d at 285. However, the concept of state action for antitrust purposes is wholly separate from the concept of state action for section 1983 purposes. "State action" under the antitrust laws is defined by a completely different test, created under different circumstances, for different reasons. *See Patrick v. Burget*, 486 U.S. 94, 100, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 104, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980) (explaining that the Sherman Act was directed toward "individual and not state action" and that state regulatory schemes cannot violate it).[3] Indeed,

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[3] The United States Supreme Court "established a rigorous two-pronged test to determine whether anti-competitive conduct engaged in by private parties should be deemed state action and thus shielded from the antitrust laws. First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy.' Second, the anti-competitive conduct must be 'actively supervised' by the State

to create "state action" for antitrust purposes, the state must overtly and explicitly authorize the private entity to engage in the challenged activity. *Marrese v. Interqual, Inc.*, 748 F.2d 373, 386 n. 18 (7th Cir.1984).

Other courts have also recognized this distinction. In *Ezpeleta*, a case bearing a strong factual similarity to the case before us, the plaintiff physician brought suit against a private hospital, alleging violations of the Sherman Act and section 1983 in her peer review process. The plaintiff argued that because "state action" worked to bar her antitrust claims, it should likewise exist for section 1983. The court disagreed, noting that "[s]imilar sounding phrases often have different meanings when applied in different legal contexts. This is such a case. . . . [T]he elements required for a cause of action under section 1983 differ from the elements required for state action under the antitrust laws." *Ezpeleta*, 800 F.2d at 122; *see also Marrese*, 748 F.2d at 395 n. 25.

Because Nicholas has not shown that either of the requirements for state action under the *Lugar* test have been satisfied in this case, we conclude that NCMC's peer review process did not constitute state action for the purpose of section 1983. Consequently, we need not determine whether the other elements for section 1983 liability are present, including whether Nicholas was deprived of due process rights. Nicholas may not advance his claim under 42 U.S.C. § 1983.

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itself." *Patrick*, 486 U.S. at 100, 108 S.Ct. 1658 (internal citations omitted).

B.

Immunity from State Claims under the HCQIA

In addition to its determination regarding section 1983, the trial court separately held that NCMC enjoyed immunity from liability for damages arising from Nicholas's state law claims,[4] because the peer review process had substantially complied with the provisions of the HCQIA and the CPRA. The court of appeals disagreed, holding that the requirements of these statutes were not or may not have been met, and that NCMC did not have immunity. *See Nicholas III*, 12 P.3d at 287-88. We hold that the evidence in the record demonstrates that NCMC complied with the requirements of the HCQIA and the CPRA, and that summary judgment in favor of NCMC was therefore proper. We discuss the HCQIA and the CPRA in turn.

1. Scope and Purpose of the HCQIA

Congress adopted the HCQIA in 1986 in response to the "increasing occurrence of medical malpractice and the need to improve the quality of medical care" in the United States. 42 U.S.C. § 11101(1). The purpose of the statute is to "improve the quality of medical care by encouraging physicians to identify and discipline other physicians who are incompetent or who engage in unprofessional behavior." H.R.Rep. No. 99-903, at 2

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[4] We do not include among the state law claims Nicholas's claim for anti-competitive conduct. The trial court correctly noted that Nicholas's sole and exclusive remedy for this claim is appeal to the CAC. *See* § 12-36.5-106(7).

(1986), *reprinted in* 1986 U.S.C.C.A.N. 6384, 6384. In furtherance of this goal, the HCQIA grants immunity from actions for damages to participants in medical peer review activities. *See* 42 U.S.C. § 11111; *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1333 (10th Cir.1996); *Pfenninger v. Exempla, Inc.*, 116 F.Supp.2d 1184, 1198 (D.Colo.2000). Congress concluded that absent immunity from potential money damages, including treble damage liability under federal antitrust law, physicians would be discouraged from participating in effective professional peer review. 42 U.S.C. § 11101(4). The HCQIA "is designed to facilitate the frank exchange of information among professionals conducting peer review inquiries without the fear of reprisals in civil lawsuits." *Bryan v. James E. Holmes Reg'l Med. Ctr.*, 33 F.3d 1318, 1322 (11th Cir.1994).

The events and parties in this case fall squarely within the scope of the statute. The HCQIA grants immunity to a "professional review body," its members and staff, parties with which it has a contractual relationship, and other participants in a "professional review action" when all the statutory requirements are met. § 11111(a)(1). A "professional review body" is defined as:

> [A] health care entity and the governing body or any committee of a health care entity which conducts professional review activity, and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity.

42 U.S.C. § 11151(11).

> A "professional review activity" is defined as:
>
> [A]n activity of a health care entity with respect to an individual physician –
>
> (A) to determine whether the physician may have clinical privileges with respect to, or membership in, the entity,
>
> (B) to determine the scope or conditions of such privileges or membership, or
>
> (C) to change or modify such privileges or membership.

Id. § 11151(10). Here, NCMC's QA Committee, Credentials Subcommittee, and Fair Hearing Panel all conducted or assisted in a "professional review activity" as defined by the statute, and therefore all qualify as "professional review bodies" under the statute.[5] Likewise, NCMC's activities fall within the meaning of "professional review action":

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[5] The QA Committee is a committee of the medical staff that assisted in investigating Nicholas. *See North Colorado Medical Center Medical Staff Bylaws*, § 8.3.g, at 22-23 (1989). The Credentials Subcommittee is a committee of NCMC whose express role includes the duty to "[i]nvestigate, review, and report on matters, including the clinical and ethical conduct of any member of the Medical staff or any Allied Health Professional as may be assigned or referred to it in accordance with policies and procedures established by the Board [of Directors]." *Bylaws of North Colorado Medical Center, Inc.* 12 (1990). The Fair Hearing Panel was assembled by the Credentials Subcommittee for the express purpose of determining the scope of Nicholas's privileges. *See North Colorado Medical Center Medical Staff Corrective Action/Fair Hearing Plan* 6-13 (1988).

> The term "professional review action" means an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of a physician.

Id. § 11151(9).

Therefore, if NCMC's peer review process met the standards set forth in the statute, the hospital and participants in the review process are immune from liability for damages.

2. Standard of Review for HCQIA Immunity

Immunity under the HCQIA is a question of law for the court to decide, and may be resolved whenever the record has been sufficiently developed. *Bryan,* 33 F.3d at 1332. We review de novo legal questions concerning immunity. *See Springer v. City & County of Denver,* 13 P.3d 794, 798 (Colo.2000).

The HCQIA creates a rebuttable presumption in favor of immunity, and the plaintiff has the burden of proving by a preponderance of the evidence that the peer review process was not reasonable. 42 U.S.C. § 11112(a); *Brown,* 101 F.3d at 1333; *Pfenninger,* 116 F.Supp.2d at 1199. Reasonableness is measured by an objective standard

rather than a subjective, "good faith" standard. *Brown*, 101 F.3d at 1333; *Bryan*, 33 F.3d at 1323.

Section 11112(a) sets out four specific standards for determining whether the participants in a professional review action are entitled to immunity. These standards require that a professional review action be taken:

> (1) in the reasonable belief that the action was in furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

§ 11112(a). Nicholas need only show by a preponderance of the evidence that any one of these four standards was not met. *Pfenninger*, 116 F.Supp.2d at 1199; *see also Austin v. McNamara*, 979 F.2d 728, 734 (9th Cir.1992).

3. Elements of Immunity Under Section 11112(a)

We therefore examine whether Nicholas met his evidentiary burden of demonstrating that at least one of the immunity standards in section 11112(a) was not satisfied. We discuss each element in turn, and conclude that Nicholas did not meet his burden of proof.

First, NCMC's decision to suspend Nicholas's privileges had to be made "in the reasonable belief that the action was in the furtherance of quality health care." § 11112(a)(1). This element is satisfied "if the [peer] reviewers, with the information available to them at the time of the professional review action, would reasonably have concluded that their action would restrict incompetent behavior or would protect patients." H.R.Rep. No. 99-903, at 10, *reprinted in* 1986 U.S.C.C.A.N. at 6393. The record in this case reveals that the Board of Directors' decision was spurred by concerns over Nicholas's deficiencies in medical record-keeping and its potential harmful effect on his patients and the medical staff. The Board's decision was based on a report from its House Committee, which adopted the factual findings made by the Fair Hearing Panel. Among the Panel's conclusions were:

> 11. That Nicholas lacks insight into the purpose and process of creating a valid and useful medical record. He operates under the false impression that detailed dictation in procedure notes substitutes for current and complete entries in the progress notes. Nicholas's paucity of initial documentation in the progress notes and his constant need to recreate the record in light of new findings leads the Panel to the conclusion that he has a definite inability to form a rational treatment plan based on a logical progression of thought. His entries in the progress notes are inadequate to communicate his reasoning and treatment plan without additional information to nurses and other professionals. *This continuing deficiency* is, in our opinion, at the root of Nicholas's problems as it

causes others to perceive (a) a lack of judgment, (b) a lack of planning or coherent treatment plan, (c) the use of unnecessary or unindicated treatment, and (d) unethical behavior.

. . . .

14. That the relationship of Nicholas to the staff of the Cardiac Catheterization Laboratory was strained at best and can be characterized by an *almost complete lack of communication.* This situation was caused, in part, by the practice of Nicholas to think out loud in the Laboratory. This practice *confused the staff and led to the staff's conclusion that Nicholas lacked any previously designed treatment plan whatsoever and resulted ultimately in a lack of confidence and respect.*

(Emphasis added.)

It is evident from the record that, as an objective matter, the Board of Directors could have reasonably believed that Nicholas's poor documentation and communication skills caused dissention and confusion among the laboratory staff sufficient to adversely affect patient care. Nicholas failed to present evidence that the Board's action was not supported by this reasonable belief.

Nicholas's assertion that NCMC's review was spurred by anti-competitive leanings of a competing physician does not change this calculus. Even if this allegation has merit, as the CAC found, *see Nicholas II*, 914 P.2d at 905, it does not change the numerous objective deficiencies in Nicholas's practice that would need to be addressed in the interest of promoting quality health care.

Second, the professional review action must be taken "after a reasonable effort to obtain the facts of the matter." § 11112(a)(2). "The relevant inquiry is whether the totality of the process leading to the review action evinces a reasonable effort" to obtain the facts. *Pfenninger,* 116 F.Supp.2d at 1202 (citing *Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 637 (3d Cir.1996)). The NCMC Board of Directors suspended Nicholas's invasive cardiology privileges only after a lengthy investigation by a number of committees and independent parties, including: the initial complaints of variances with Nicholas's practice; a QA Committee investigation; Dr. Jang's independent report; the Credentials Subcommittee's review of the report and interview of Nicholas; the evidence presented before the Fair Hearing Panel; and the House Committee's review of the Panel's conclusions. Nicholas has introduced no evidence to suggest that NCMC did not make reasonable efforts to obtain the facts prior to the decision of the Board of Directors.

Third, there must be "adequate notice and hearing procedures" afforded to the physician who is the subject of the action. § 11112(a)(3).[6] The record in this case indicates that NCMC substantially complied with each of the notice and hearing requirements. On November 5, 1991, NCMC sent Nicholas notice that the Credentials Subcommittee had taken action against him and that he had a right to request a hearing within 30 days. The Credentials Subcommittee also sent Nicholas a copy of the Corrective

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[6] The HCQIA sets forth detailed conditions for adequate notice and hearing in section 11112(b).

Action Report, which set forth the Fair Hearing procedure and Nicholas's rights at the hearing. At the hearing, Nicholas was represented by counsel and afforded the opportunity to confront and cross-examine witnesses. The Fair Hearing Panel considered testimony from more than 15 individuals, as well as over 120 separate exhibits. The hearing was transcribed, and the Panel later issued a report explaining its findings and issuing its recommendation. The NCMC Board of Directors sent written notice of its decision to Nicholas. There is no evidence in the record to suggest that Nicholas was not afforded adequate notice or was denied a fair hearing.

The final immunity requirement under the HCQIA is that the professional review action be taken "in the reasonable belief that the action was warranted by the facts known." § 11112(a)(4). The question is whether "the record reveals that the [NCMC Board of Directors] had a factual basis for its action." *Bryan*, 33 F.3d at 1337. We hold that it does. Nicholas does not dispute the factual findings underlying the recommendations of the Fair Hearing Panel. Rather, he argues in his brief that the findings were set aside and were never transmitted to the Board of Directors. This assertion is not supported by the record. Indeed, in its memorandum to the Board of Directors, the House Committee cited many of the Panel's findings of fact verbatim before making its own recommendations.

The intent of the HCQIA's grant of immunity "was not to disturb, but to reinforce, the preexisting reluctance of courts to substitute their judgment on the merits for that of health care professionals and of the governing bodies of hospitals in an area within their expertise." *Id.;*

Mahmoodian v. United Hosp. Ctr., Inc., 185 W.Va. 59, 404 S.E.2d 750, 756 (1991). Where the requirements of section 11112(a) are fulfilled, we need not extend our inquiry further. We hold that Nicholas has failed to demonstrate that section 11112(a)'s standards were not satisfied, and accordingly we determine that NCMC and the participants in the peer review process are immune from damages under the HCQIA.

C.

Immunity from State Claims under the CPRA

1. Scope and Purpose of the CPRA

Shortly after Congress passed the HCQIA, the Colorado General Assembly enacted the CPRA. Act approved June 7, 1989, ch. 113, sec. 1, 1989 Colo. Sess. Laws 678-690. Like the HCQIA, the CPRA is designed to protect medical patients "from unprofessional conduct by persons licensed to practice medicine." § 12-36.5-101(1). The CPRA establishes professional review committees "to study and review in good faith the professional conduct of physicians, including the quality and appropriateness of patient care." § 12-36.5-103(2).

The CPRA contains two parts. The first, and more comprehensive, part establishes professional review committees and sets forth guidelines for their conduct. *See* §§ 12-36.5-101 to -106. In addition, it provides that parties who conduct professional review within the statutory requirements and guidelines are immune from suit in subsequent actions brought by the physician being reviewed. § 12-36.5-105. The criteria for immunity under the CPRA depend on the status of the party seeking immunity. *See id.*

The second part of the CPRA is "intended to be responsive to the specific requirements" of the HCQIA.[7] § 12-36.5-201. As a general matter, a professional review body,[8] its members and staff, parties in a contractual relationship with it, or other participants in the professional review action "shall not be liable for damages in any civil action with respect to their participation in, assistance to, or reporting of information to a professional review body which meets the standards of and is in conformity with the provisions of the federal 'Health Care Quality Improvement Act of 1986.' " § 12-36.5-203(1).

The CPRA therefore sets out overlapping provisions that may provide a party with one or more sources of immunity stemming from participation in a professional peer review process. We now turn to whether the petitioners have satisfied these requirements.

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[7] The CPRA, however, does not share the HCQIA's presumption that professional review activities are undertaken for the purpose of assuring quality care and patient safety. *Nicholas II*, 914 P.2d at 906.

[8] The term "professional review body" in the CPRA is different from the term "professional review committee." The definition of "professional review body" mirrors the definition in the HCQIA, *see* 42 U.S.C. § 11151(11), and applies only to the part of the CPRA discussing conformance with the HCQIA. *See* § 12-36.5-203(3)(b). We discuss the definition of "professional review committees" in Part II.C.2.b.

2. Immunity from Suit Under the CPRA

a. Board of Directors

The CPRA establishes specific requirements for immunity for a medical facility, its governing board, and members of that board:

> The governing board, the individual members of such board, and the entity which has established a peer review committee pursuant to section 12-36.5-104 shall be immune from suit for any damages in a civil or criminal action, including antitrust actions, brought by a physician who is the subject of any action taken by such board or members if such board or members, acting as individuals, act in good faith. Good faith shall include reliance upon the recommendations of the review committee, but good faith shall not be presumed if the board or a member has knowledge concerning the review in question which would cause such reliance to be unwarranted. Good faith shall also require that the board otherwise acted in good faith, including the consideration of any facts not previously available to and considered by the peer review committee, and that the board acted in reasonable belief that the action taken was warranted by the facts.

§ 12-36.5-105(2). The plain language of the statute indicates that the sole requirement for immunity for the governing board and its members is good faith. For the purpose of section 12-36.5-105(2), "good faith" presupposes: (1) reasonable reliance upon the review committee's recommendations, unless there is knowledge that would render reliance unwarranted; (2) consideration of

facts previously unknown to the review committee; (3) reasonable belief that the action taken was warranted by the facts; and (4) otherwise acting in good faith.[9]

Nicholas asserts that the Board of Directors did not act in good faith, because the Board did not reasonably rely on the recommendations of the "review committee" in this case, the Fair Hearing Panel. Rather, Nicholas claims that the Board of Directors ignored the Panel's findings, and ultimately acted on the House Committee's recommendations.

We agree that the highest-ranking NCMC organization to qualify as a "peer review committee" under the CPRA was the Fair Hearing Panel, and that as a matter of good faith, the Board was required to rely on the Panel's findings and recommendations.[10] However, "reliance"

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[9] During the 1993 hearing on anti-competitive conduct, the CAC concluded that Nicholas's peer review process was not conducted in good faith as a quality assurance measure. *See Nicholas I*, 902 P.2d at 466. We do not view this conclusion or the cases affirming it as binding collateral estoppel. The CAC's role in professional review actions is "limited to the sole issue of whether [the] final board action resulted from unreasonable anticompetitive conduct." § 12-36.5-106(7). The first opportunity for the parties to conduct a full and fair hearing on the immunity issue did not occur until the trial court's hearing in January 1998.

[10] The CPRA does not define "peer review committee." However, it does provide that "Any peer review committee established or created by a combination or pooling of any of the organizations authorized by" the CPRA to establish professional review committees is itself a professional review committee. § 12-36.5-104(4)(h). Because peer review committees are thus subsets of professional review committees, we

does not imply blind adherence to the Panel's recommendations. Indeed, the CPRA explicitly provides that as a matter of good faith, the Board should look to any facts not previously considered by the peer review committee, and should act in the reasonable belief that its ultimate action was warranted by the facts. § 12-36.5-105(2). Good faith is not to be presumed if the Board or its individual members willfully ignore additional information pertinent to the review. *See id.*

The record indicates that in formulating its decision, the House Committee of the Board of Directors considered both the Fair Hearing Panel report and the Credentials Subcommittee report. While the House Committee reached different recommendations regarding Nicholas's privileges than did the Fair Hearing Panel, the House Committee adopted the Fair Hearing Panel's findings of fact in making its recommendations. There is no evidence that the Board of Directors did not adopt the same findings of fact in making its final decision.

The Board's only deviation from the Fair Hearing Panel's report was its decision to temporarily suspend some of Nicholas's privileges rather than retain those privileges and keep Nicholas under supervision. This decision was within the Board's discretion and duty to act in the reasonable belief that the action taken was warranted by the facts. § 12-36.5-105(2). We therefore conclude that the Board of Directors and its members are

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conclude that peer review committees are professional review committees that are primarily composed of physicians. Neither the Board of Directors nor its House Committee meet this definition.

entitled to immunity from suit under section 12-36.5-105(2).

b. Other Participants in the Peer Review Process

The CPRA also provides immunity to participants in the professional review process who are not affiliated with the governing board of the medical facility. Section 12-36.5-105(1) states:

> A member of a professional review committee, a witness before a professional review committee, or any person who files a complaint or otherwise participates in the professional review process shall be immune from suit in any civil or criminal action, including antitrust actions, brought by a physician who is the subject of the review by such professional review committee, if such member made a reasonable effort to obtain the facts of the matter as to which he acted, acted in the reasonable belief that the action taken by him was warranted by the facts, and otherwise acted in good faith within the scope of such professional review committee process and if such witness or participant acted in good faith within the scope of such professional review committee process.

The plain language of section 12-36.5-105(1) addresses immunity for two different types of parties: members of professional review committees, and participants in the peer review process who are not professional review committee members. Members of professional review committees are subject to a three-pronged immunity test similar to that for "good faith" for governing boards in section 12-36.5-105(2). Members of professional

review committees are immune from suit by a physician who is the subject of the review if: (1) the member made a reasonable effort to obtain the facts of the matter; (2) the member acted in the reasonable belief that the action taken was warranted by the facts; and (3) the member otherwise acted in good faith within the scope of the review process. § 12-36.5-105(1).

Individual witnesses and participants in the professional review process who are not members of the professional review committee or affiliated with the medical facility's governing board are entitled to immunity from suit as long as they have acted in good faith within the scope of the professional review process. *Id.*

Having laid out the immunity provisions for individual parties, we apply the appropriate provisions to petitioners Alyce Kantner and Karl Gills.[11] We conclude that each of these petitioners is entitled to immunity under the CPRA.

(1) Alyce Kantner

Alyce Kantner was the director of the medical staff at NCMC from the fall of 1989 to the end of 1991. Kantner was a member of the hospital's administrative staff, and also served as support staff for the QA Committee and the Credentials Subcommittee. However, she was not a member of either the QA Committee or the Credentials

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[11] Nicholas initially named two additional individual defendants, Richard Stenner and Pat Kern. Nicholas dropped all claims against Stenner and Kern during the immunity hearing.

Subcommittee. The record indicates that in her support staff role, Kantner was responsible for providing various documents and maintaining paperwork. Kantner also participated in the drafting of the Credentials Subcommittee's Corrective Action Report. Her employment with NCMC ended before the Fair Hearing Panel began its activities.

Because Kantner was not a member of the Board of Directors or any committee relevant to this case, we evaluate her immunity solely as a participant in the peer review process. Kantner is accordingly entitled to immunity from suit under section 12-36.5-105(1) if she acted in good faith within the scope of the professional review process.

Nicholas alleges that Kantner did not act in good faith for the purposes of section 12-36.5-105(1) because she provided biased information to independent reviewers, distributed altered copies of an echocardiogram (EKG) to the Credentials Subcommittee, and subjectively desired that Nicholas lose his privileges. The trial court, however, concluded that Kantner had acted reasonably and in good faith. The evidence in the record supports the trial court's conclusion. The information Kantner provided to the outside reviewer was appropriate for such a review; there is no indication that the information she provided was false, and it was the province of the outside reviewer to determine importance and relevancy of the information provided. Nor does the

evidence show that Kantner acted in bad faith in distributing copies of the "altered" EKG.[12] Furthermore, as the trial court noted, even if Kantner did subjectively believe that Nicholas should not be practicing at NCMC, she was privy to information that would justify that belief. The evidence in the record supports the conclusion that Kantner acted in good faith, and she is therefore entitled to immunity from suit under section 12-36.5-105(1).

(2) Karl Gills

At the time of Nicholas's peer review, Karl Gills was NCMC's senior vice-president. In this capacity, Gills was a member of the Credentials Subcommittee and the House Committee. However, Gills was not a voting member of the House Committee, and his role on the House Committee was primarily to provide information on hospital activities.

The appropriate immunity test for Gills under section 12-36.5-105 turns on whether the Credentials Subcommittee and the House Committee were "professional review committees" within the meaning of the CPRA. If they were, Gills must satisfy the three-pronged test for members of professional review committees; if they were not,

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[12] According to testimony at the immunity hearing, Nicholas gave Kantner a black-and-white copy of an EKG with blue writing on it for review by the Credentials Subcommittee. Kantner's staff then made copies of the document and distributed them. The Subcommittee apparently inferred from the copies that Nicholas had impermissibly altered the original EKG. There is no evidence in the record that Kantner acted to mislead the Subcommittee.

Gills must be evaluated under the "good faith" standard as a participant in the professional review process.

The CPRA defines "professional review committee" as "any committee authorized under the provisions of this article to review and evaluate the professional conduct of and the quality and appropriateness of patient care provided by any physician licensed" in Colorado. § 12-36.5-102(3). Authorized professional review committees must satisfy the following statutory conditions: (1) they must be composed of a majority of physicians, *see* § 12-36.5-104(2); (2) they must be established by the hospital's medical staff, its governing board, or a combination thereof, *see* § 12-36.5-104(4); and (3) they must operate pursuant to written bylaws, approved by the hospital's governing board, that are in compliance with the CPRA, *see id.*

Given these criteria, we conclude that only the Credentials Subcommittee qualifies as a "professional review committee" within the meaning of the CPRA. The Credentials Subcommittee is composed of a majority of physicians, was established by NCMC's governing board, and operates pursuant to substantially conforming hospital bylaws. The House Committee, which is not composed primarily of physicians, is not a "professional review committee" under the CPRA. Therefore, we must evaluate Gills's immunity for participation in the Credentials Subcommittee and the House Committee separately.

Gills is entitled to immunity for his involvement in the House Committee proceedings if he acted in good faith. § 12-36.5-105(1). Nicholas argues that Gills did not act in good faith primarily because Gills served on both

the Credentials Subcommittee and the House Committee, and did not recuse himself from the House Committee even when that committee was considering the report and recommendations of the Credentials Subcommittee in the Nicholas matter. Citing *deKoevend v. Board of Education*, 688 P.2d 219, 228 (Colo.1984), the court of appeals concluded that Gills improperly served as a member of both committees during Nicholas's professional review process. *See Nicholas III*, 12 P.3d at 290. We disagree.

The facts of *deKoevend* are distinguishable from those before us here. In that case, a school board terminated the employment of a tenured teacher after a closed door session that included the principal complainants against the teacher, but not the teacher himself. We noted that the presence in the closed door session of parties with a prosecutorial role "was such as to substantially undermine the appearance of impartiality." *deKoevend*, 688 P.2d at 228. Here, by contrast, Gills's role in the professional review process is best characterized as investigative, not prosecutorial. Gills did not bring any charges against Nicholas; rather, he investigated the charges brought to the Credentials Subcommittee's attention. As the United States Supreme Court has noted, there is no logical or legal inconsistency in a certain mixing of investigative and adjudicative roles in administrative proceedings. *See Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). A party seeking to show bias resulting from these dual roles "must overcome a presumption of honesty and integrity in those serving as adjudicators" and must show that "conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be

forbidden if the guarantee of due process is to be adequately implemented." *Id.*

Nicholas has made no such showing here. The evidence in the record demonstrates that Gills's dual role did not improperly influence the House Committee's recommendations or the Board of Directors' final decision. Gills did not participate in the House Committee deliberations, but served merely as a link between that committee and the Credentials Subcommittee. His involvement in both organizations was not improper. Therefore, we conclude that Gills is immune from suit for his involvement in the House Committee activities.

Because the Credentials Subcommittee is a "professional review committee" within the meaning of the CPRA, Gills is immune from suit as a member of the Credentials Subcommittee only if he made a reasonable effort to obtain the facts of the Nicholas matter, reasonably relied on those facts in making recommendations, and otherwise acted in good faith. Nicholas only contends that Gills failed the "good faith" prong of this test, maintaining that Gills, like Kantner, supplied biasing documents to outside reviewers. Our review of the record shows that Gills did not knowingly provide any biased information. Nor is there any other indication of lack of good faith, or personal or pecuniary interest in removing Nicholas's privileges. We therefore conclude that Gills is immune from suit as a member of the Credentials Subcommittee under section 12-36.5-105(1).

3. Immunity from Damages Under the CPRA

As a separate source of immunity, the CPRA grants professional review bodies, their members, parties in contract with them, and other participants in the professional review process immunity from liability for damages when they act in accordance with the HCQIA. § 12-36.5-203. NCMC satisfied the terms of the federal statute, *see* Part II.B., and falls squarely within the definition of "professional review body" in the CPRA. *See* § 12-36.5-203(3)(b). All petitioners are therefore immune from liability for damages under this section.[13] *See id.*

Finally, the CPRA provides one additional source of immunity to individuals. No person who provides information to a professional review body regarding the competence or professional conduct of a physician shall be held liable in damages in any civil action for having provided such information "unless such information is false and the person providing it knew that such information was false." § 12-36.5-203(2). There is no evidence that either Kantner or Gills knowingly provided false information to the QA Committee, Credentials Subcommittee, or the House Committee. Kantner and Gills are therefore also immune from liability for damages under section 12-36.5-203.

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[13] Because the petitioners are immune from suit under the first part of the CPRA, they also enjoy the lesser immunity from liability for damages. We nevertheless address this issue because it is so closely tied to our analysis under the HCQIA and the first part of the CPRA. *See* Parts II.B. and II.C.2. of this opinion.

Because NCMC, its Board of Directors, and the individually named petitioners are each immune from suit under the CPRA and immune from liability for damages under the CPRA and HCQIA, Nicholas may not advance his remaining state law claims arising from the professional peer review process.

III.

Both the United States Congress and the Colorado General Assembly have demonstrated a clear intent to encourage professional peer review in the medical field, and to immunize participants in the peer review process from subsequent liability and/or suit when the process satisfies appropriate standards. We hold that the petitioners have met these standards, and therefore enjoy immunity from Nicholas's state law claims. In addition, we hold that Nicholas may not advance his claim for violations of federal civil rights under 42 U.S.C. § 1983, because NCMC's activities do not qualify as "state action" necessary to trigger the statute. Accordingly, we reverse the judgment of the court of appeals and remand the case to that court with directions to return it to the trial court to reinstate the orders granting summary judgment for NCMC.

Colorado Court of Appeals,
Div. IV.

William John NICHOLAS, M.D.,
Plaintiff-Appellant,

v.

NORTH COLORADO MEDICAL CENTER, INC., a Colorado corporation commonly referred to as NCMC and its Board of Directors; Richard H. Stenner, President; Karl B. Gills, Executive Vice-President; Alyce Kantner, former Director of Medical Services; and Pat (Wilson) Kern, Director of Cardiovascular Services,
Defendants-Appellees.

No. 98CA1407.

Dec. 9, 1999.

As Modified on Denial of Rehearing April 13, 2000.
Certiorari Granted Nov. 6, 2000.

Anthony, Nicholas & Sharpe, LLC., *Phillip A. Nicholas, Jason M. Tangeman, Steven K. Sharpe*, Laramie, Wyoming, for Plaintiff-Appellant.

Gallo, Reinan & Marek, LLC., *J.M. Reinan, F. James Gallo, Sherman Marek, William L. Burk*, Lisa M. Horvath, Denver, Colorado, for Defendants-Appellees.

Opinion by Judge *ROTHENBERG*.

Plaintiff, Dr. William John Nicholas, appeals a summary judgment determining that: (1) defendants, North Colorado Medical Center, Inc. (NCMC), Karl Gills, and Alyce Kantner, were not state actors for purposes of liability under 42 U.S.C. § 1983 (1995); and (2) with

respect to Nicholas' state contract and tort claims, defendants were immune from liability for damages under the federal Health Care Quality Improvement Act (HCQIA), 42 U.S.C. § 11101, et seq. (1995), and also immune from suit and liability for damages under the Colorado Professional Review of Health Care Providers Act (CPRA), § 12-36.5-101, et seq., C.R.S.1999. We reverse and remand for further proceedings.

I. Facts

Nicholas is a licensed physician specializing in the practice of invasive cardiology and angioplasty. Invasive cardiology involves placing catheters, or small tubes, into the blood vessels of the heart in order to determine whether blockages exist in those vessels. Angioplasty is a subspecialty of invasive cardiology involving the use of a catheter with a balloon on the tip to prevent heart attacks. Invasive cardiology is practiced in a cardiac catheterization lab.

In 1991, Nicholas' privilege to practice in NCMC's cardiac catheterization lab was summarily suspended as the result of an investigation into the quality of his practice. Problems with Nicholas' practice had been brought to the attention of NCMC's Department of Medicine Quality Assurance Committee (also referred to as the Quality Assessment Committee). Three of Nicholas' patients had suffered strokes in a relatively short period of time and one had died. There also was concern over Nicholas' ability properly to keep medical records.

The Quality Assurance Committee, composed of physicians chosen by the medical staff, perceived a problem

and had Nicholas' practice reviewed by an outside physician who returned a report critical of Nicholas and the entire NCMC cardiac catheterization lab. The Quality Assurance Committee turned the matter over to NCMC's Credentials Subcommittee, recommending that Nicholas be proctored.

The Credentials Subcommittee was a subcommittee of the Board of Directors of NCMC composed of a majority of physicians, none of whom was in direct competition with Nicholas. The Credentials Subcommittee conducted further review and directed the President of the Hospital to suspend Nicholas' privileges pending an investigation.

Following an investigation, the Credentials Subcommittee found problems with Nicholas' practice, including poor judgment and the inability to maintain proper records. It recommended that his privileges be suspended for a year, after which he could reapply.

Nicholas appealed to NCMC's Fair Hearing Panel which was composed of three physicians, none of whom had anything to do with the investigation or was in direct competition with Nicholas. The Panel generally cleared Nicholas of wrongdoing, except with regard to his record-keeping, and recommended that he be proctored for a year.

Nicholas and the Subcommittee appealed the Panel's findings and recommendations to the House Committee, which under NCMC's bylaws consisted of three or more members of the Board of Directors. There was no requirement that any member be a physician. The House Committee was charged with the task of making such recommendations to the Board as it deemed appropriate.

The House Committee included members who were also on the Credentials Subcommittee.

After hearing arguments, the House Committee found that: (1) the Credentials Subcommittee and the Fair Hearing Panel had agreed on Nicholas' inability properly to maintain medical records in his cases; and (2) the inability to maintain clear records interfered with quality medical care. The House Committee recommended to the Board of Directors that Nicholas' privileges be suspended for a year, a recommendation which the Board adopted.

Nicholas then appealed the Board of Directors' decision to the state Committee on Anticompetitive Conduct. Following a hearing, that committee concluded that the Board's decision to suspend Nicholas was proximately caused by the hostility and the anti-competitive feeling of another NCMC cardiologist, rather than by a desire to improve patient care. The Committee on Anticompetitive Conduct ordered Nicholas' privileges reinstated and that decision was upheld on appeal. *See Nicholas v. North Colorado Medical Center, Inc.*, 902 P.2d 462 (Colo.App.1995), *aff'd, North Colorado Medical Center, Inc. v. Committee on Anticompetitive Conduct*, 914 P.2d 902 (Colo.1996).

Following the reinstatement of his privileges, Nicholas filed this action against NCMC and certain of its administrators seeking damages plus injunctive and declaratory relief. His claims for injunctive and declaratory relief were dismissed by the trial court and Nicholas does not appeal that dismissal. He appeals only from the dismissal of his claim for damages under 42 U.S.C. § 1983, and from the dismissal of his remaining state

claims against NCMC and two of its administrators, defendants Karl Gills and Alyce Kantner.

II. State Action under 42 U.S.C. § 1983

With regard to Nicholas' § 1983 claim, the trial court ruled that NCMC, a Colorado nonprofit corporation, was a private hospital, and therefore, that its actions and those of the other defendants did not constitute state action for purposes of § 1983. On that basis, the court granted summary judgment in favor of defendants and dismissed the federal claim.

Nicholas contends that NCMC's decision to suspend his privileges was professional peer review under CPRA, and constituted state action for the purposes of § 1983 liability. We agree.

In order for there to be liability under § 1983, "the conduct allegedly causing the deprivation of a federal right [must] be fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753-54, 73 L.Ed.2d 482, 495 (1982).

There is state action when the alleged deprivation of constitutional rights was "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Lugar v. Edmondson Oil Co., supra*, 457 U.S. at 937, 102 S.Ct. at 2754, 73 L.Ed.2d at 495.

In addition, "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co., supra*, 457 U.S. at 937, 102 S.Ct. at 2754, 73 L.Ed.2d at 495; *Gallagher v. "Neil*

Young Freedom Concert," 49 F.3d 1442 (10th Cir.1995) (under all of the state action tests, the conduct causing the deprivation of a federal right must be fairly attributable to the state).

The use of professional review committees is an extension of the authority of the Colorado State Board of Medical Examiners. Section 12-36.5-103(3)(a), C.R.S.1999. The State Board of Medical Examiners is a creature of statute whose members are appointed by the governor, and is an arm of the state. *See* § 12-36-103, C.R.S.1999. Accordingly, when it is performing peer review activities, the governing board of a hospital is "clothed with the status of a state agency." *Nicholas v. North Colorado Medical Center, Inc., supra,* 902 P.2d at 466; *see* Yu, *The Committee on Anticompetitive Conduct: New Agency on the Block,* 21 Colo. Law. 31 (January 1992).

Here, in a March 1993 order denying defendants' motion to dismiss, the trial court initially rejected defendants' claim that no state action was involved because NCMC was a private hospital. The trial court concluded that it made no difference whether NCMC was private or public and that when the hospital engaged in professional review, it constituted state action. The court explained that:

> The clear import of CRS 12-36.5-101 et seq. is to make the licensure, discipline, and professional review of persons licensed to practice medicine a matter of state control. Professional review committees act as an arm or division of the state board of medical examiners.

In December 1997, however, the trial court reversed its earlier ruling, concluding that "professional peer

review at a private hospital did not qualify as 'state action' for [the] purposes of 42 U.S.C. § 1983." The court explained that this contrary result was required by the recent announcement of *Berg v. Shapiro,* 948 P.2d 59 (Colo.App.1997).

In *Berg v. Shapiro, supra,* a division of this court held that professional peer review at a private hospital was *not* state action for purposes of § 1983 liability. But, in so holding, the panel there specifically distinguished *Nicholas v. North Colorado Medical Center, Inc., supra,* noting that Nicholas involved anticompetitive conduct and Berg did not.

The distinction made by the panel in *Berg v. Shapiro, supra,* is not without significance. While peer review has been deemed to be essential to quality medical care, physicians engaging in professional review proceedings have been concerned that they might be accused by the disciplined physicians of engaging in anticompetitive acts and later sued for violating federal antitrust laws. *See Patrick v. Burget,* 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988).

Federal decisions have held that the antitrust laws are applicable to hospital peer review decisions unless: (1) the challenged restraint is articulated clearly and expressed affirmatively as state policy; and (2) the anticompetitive conduct is actively supervised by the state itself. *Patrick v. Burget, supra.*

In Colorado, the CPRA and the creation of the Committee on Anticompetitive Conduct were intended, among other things, to insulate physicians from antitrust liability arising from their participation in peer review

proceedings, thus allowing those engaging in peer review to assert the defense of state action immunity. As one commentator explained:

> The CPRA was enacted, in part, to implement the federal Health Care Quality Improvement Act of 1986 ("HCQIA"). The CPRA also created a new, little known state agency called the Committee on Anticompetitive Conduct ("Committee")
>
> . . .
>
> The CPRA addresses antitrust liability directly by granting to participants in peer review organizations a qualified immunity from suit, civil or criminal, by the physician who is under review. However, as if the statutory immunity were insufficient, the CPRA also tries to qualify the peer review process as "state action" exempt from liability under the Sherman Act. The creation of the Committee is undoubtedly a response to *Patrick v. Burget*, a landmark case in the application of the antitrust laws and the state action exemption from antitrust liability to medical peer review activities.

Yu, *The Committee on Anticompetitive Conduct: New Agency on the Block, supra*, 21 Colo. Law. at 31.

Ironically, this statutory scheme insulates physicians from antitrust liability arising from their participation in peer review proceedings, but also makes them state actors for the purposes of § 1983. Immunity under § 1983 is governed by federal law, and state law cannot provide immunity from suit for federal civil rights violations. *See Wallis v. Spencer*, 193 F.3d 1054 (9th Cir.1999).

We therefore conclude that NCMC and its Board of Directors, in suspending Nicholas' privileges, were performing peer review activities which were actively supervised by the state. Hence, NCMC and its Board of Directors were clothed with the status of a state agency. *See Nicholas v. North Colorado Medical Center, Inc., Supra.* To the extent *Berg v. Shapiro, supra,* is irreconcilable with this conclusion, we decline to follow it.

The trial court correctly ruled that the defendants' actions constituted state action which may give rise to liability under § 1983, and it erred later in reversingthat ruling and in dismissing Nicholas' § 1983 claim.

Given our conclusion that the peer review activities here constituted state action, we need not consider Nicholas' additional contention that NCMC is a public hospital and that its decision to suspend his privileges constituted state action for that reason also. *See Milo v. Cushing Municipal Hospital,* 861 F.2d 1194 (10th Cir.1988) (holding that a private corporation was a public hospital for purposes of § 1983 liability); *Jatoi v. Hurst-Euless-Bedford Hospital Authority,* 807 F.2d 1214 (5th Cir.1987) (concluding that hospital was a state actor because the public entity that owned it retained control of and responsibility for the hospital).

III. Deprivation of Federal Rights

Defendants contend that, even if there was state action, Nicholas has failed as a matter of law to show he was deprived of any federal constitutional or statutory

rights under the color of state law. According to defendants, the dismissal of Nicholas' § 1983 claim by summary judgment was therefore justified on that basis. In response, Nicholas maintains that he was deprived of his right to the procedural due process required by the United States Constitution. We agree with Nicholas.

For Nicholas to prevail on his § 1983 claim, apart from showing state action, he must show he was deprived of a federal constitutional or statutory right under the color of state law. To invoke the protections of due process, he must establish that he was deprived of a constitutionally protected interest. *Setliff v. Memorial Hospital of Sheridan County*, 850 F.2d 1384 (10th Cir.1988).

A. Constitutionally Protected Interest

Medical staff privileges have been recognized to be a property interest protected by the Fourteenth Amendment, particularly when they may only be limited or revoked after a hearing. *See Setliff v. Memorial Hospital, supra.*

Nicholas was not a member of the active medical staff of NCMC, but NCMC's bylaws give the same due process protection in an action to suspend a provisional member of the medical staff as is given to an active member. Therefore, we conclude Nicholas had a protected property interest in his medical staff privileges. *But see Draghi v. County of Cook*, 184 F.3d 689 (7th Cir.1999)

(a provisional member of the medical staff had no constitutionally protected property interest in his hospital privileges where bylaws of the hospital limited the rights of provisional appointees).

In addition, the liberty interest protected by due process includes an individual's freedom to earn a living. *Setliff v. Memorial Hospital of Sheridan County, supra; see Paul v. Davis,* 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). Because the suspension of privileges seriously injured Nicholas' professional reputation and directly affected his ability to find employment as a physician, he also had a liberty interest in his staff privileges.

B. Procedural Due Process

Procedural due process requires that a party be given notice and an opportunity to be heard. It also requires fundamental fairness in procedure. Administrative agencies have the same obligation as courts to be fundamentally fair to individuals in the resolution of legal disputes involving governmental action that threatens to deprive an individual of a constitutionally protected interest. *deKoevend v. Board of Education,* 688 P.2d 219 (Colo.1984).

The kind of procedure required will vary according to the situation, but there must always be "some type of neutral and detached decision maker." *deKoevend v. Board of Education, supra,* 688 P.2d at 227.

In *deKoevend,* the Colorado Supreme Court held that this requirement of due process was violated when two interested parties who had first brought the charges against the plaintiff were allowed to sit in on the board's

deliberations. Even though neither party was a member of the board or participated in the decision, the court concluded that their presence nevertheless "violated deKoevend's due process right to a fair and impartial determination by the board." *deKoevend v. Board of Education, supra,* 688 P.2d at 228.

Similarly, here, Nicholas asserts that several members of the Credentials Subcommittee who had participated in the investigation of his practice were also members of the House Committee, and that this procedure violated due process as in *deKoevend.* We agree.

The Board of Directors, as NCMC's governing body, was responsible for the final decision to suspend Nicholas' privileges. The House Committee was appointed by NCMC's Board of Directors and acted as an arm of the governing body when it recommended suspension of Nicholas' privileges.

The record reflects that at least one member of the Credentials Subcommittee participated in the House Committee's decision, thus combining investigative and deliberative functions. Members of the House Committee were also on the Board of Directors. These members of the House Committee had already voted in favor of suspension and their presence raises a significant concern that they may have prejudged the facts of Nicholas' case. *See Tepley v. Public Employees Retirement Ass'n,* 955 P.2d 573 (Colo.App.1997) (holding that PERA improperly prejudged the evidence and thus deprived Tepley of due process when PERA's final decision was made by the same persons who initially had denied Tepley's application).

Nor was this an oversight by NCMC. Nicholas' counsel wrote a letter specifically requesting that members of the Credentials Subcommittee be disqualified from also sitting on the House Committee during his appeal. But, even after the due process issue was brought to its attention, NCMC did not disqualify one member of the Credentials Subcommittee from dual participation in the House Committee's decision.

We therefore reject defendants' argument that Nicholas failed to show he was deprived of the procedural due process required by the United States Constitution. To the contrary, we conclude as a matter of law that NCMC's procedure violated Nicholas' due process right to a fair and impartial determination by the Board, a clearly established right. *See deKoevend v. Board of Education, supra.*

Given our conclusion, we do not determine the propriety of the behavior of another member of the Credentials Subcommittee, who did not actually participate in the decision, but urged the House Committee to adopt the Credentials Subcommittee's recommendation of suspension.

IV. Immunity from State Claims under HCQIA

Nicholas contends the trial court erred in finding that the defendants were immune from damages on Nicholas' state claims under HCQIA. We conclude there is a genuine issue of fact whether the defendants violated the procedural requirements of HCQIA, and remand for further proceedings.

Congress enacted HCQIA to encourage peer review activities, "to improve the quality of medical care by encouraging physicians to identify and discipline other physicians who are incompetent or who engage in unprofessional behavior." H.R.Rep. No. 903, 99th Cong., 2d Sess. 2 (1986), reprinted in 1986 U.S.C.C.A.N. 6287, 6384; *see Sugarbaker v. SSM Health Care*, 190 F.3d 905 (8th Cir.1999); *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318 (11th Cir.1994).

As the court explained in *Bryan v. James E. Holmes Regional Medical Center, supra*, 33 F.3d at 1321:

> HCQIA is designed to facilitate the frank exchange of information among professionals conducting peer review inquiries without the fear of reprisals in civil lawsuits. The statute attempts to balance the chilling effect of litigation on peer review with concerns for protecting physicians improperly subjected to disciplinary action; accordingly, Congress granted immunity from monetary damages to participants in properly conducted peer review proceedings while preserving causes of action for injunctive or declaratory relief for aggrieved physicians.

The issue of HCQIA arose when the defendants claimed immunity under HCQIA as a defense to Nicholas' state claims. The parties agree that HCQIA provides no immunity for damages arising from Nicholas' federal claim under 42 U.S.C. § 1983. *See* 42 U.S.C. § 11111(a)(1)(D) ("The preceding sentence [conferring immunity from damages] shall not apply to damages under any law of the United States or any State relating to the civil rights of any person or persons . . . ").

However, the defendants asserted in a motion for summary judgment that HCQIA's immunity provisions insulated them from any damages arising from Nicholas' state tort and contract claims. The trial court agreed and granted summary judgment for the defendants on all of the remaining state claims.

42 U.S.C. § 11112(a) requires that a professional review action be taken: (1) in the reasonable belief that the action was in furtherance of quality health care; (2) after a reasonable effort to obtain the facts of the matter; (3) after adequate notice and hearing procedures; and (4) in the reasonable belief that the action was warranted by the facts. If these requirements are met, HCQIA provides immunity from damages. *See* 42 U.S.C. § 11111(a).

The standard for summary judgment under HCQIA is whether a reasonable jury, viewing the facts in the best light for the plaintiff, might conclude that the plaintiff has shown by a preponderance of the evidence that a defendant's actions are outside the scope of 42 U.S.C. § 11112(a). Any disputed facts must be sent to the jury as special interrogatories. *Bryan v. James E. Holmes Regional Medical Center, supra.*

Thus, we must determine whether, viewing the facts in the light most favorable to Nicholas, a reasonable jury could find that NCMC's actions were outside the scope of 42 U.S.C. § 11112(a). If so, summary judgment was improper.

In our view, a reasonable jury could agree with the Committee on Anticompetitive Conduct's determination that the action against Nicholas was not taken in the reasonable belief that it was necessary to further quality

health care. A jury also could find that NCMC's Board of Directors did not make a reasonable effort to obtain the facts of the matter before suspending Nicholas, and that NCMC thereby forfeited the protection of HCQIA.

We conclude that, because there are genuine issues of material fact which should be resolved by the jury by the submission of special interrogatories, summary judgment should not have been granted on the issue of the defendants' immunity from damages under HCQIA. *See Bryan v. James E. Holmes Regional Medical Center, supra.*

V. Immunity from State Claims under CPRA

The trial court also found the defendants were immune from suit on Nicholas' state claims based on CPRA, and granted summary judgment on that basis in favor of the defendants. Nicholas contends the trial court erred in granting such immunity. Because we conclude as a matter of law that the procedures afforded Nicholas did not comply with the requirements of CPRA, we agree.

The standard of review for statutory construction is *de novo. Watson v. Vouga Reservoir Ass'n,* 969 P.2d 815 (Colo.App.1998).

CPRA grants participants in the professional review process immunity from suit if the review is conducted in accordance with the statute's requirements. Section 12-36.5-105, C.R.S.1999. Grants of immunity are strictly construed. *Cf. Walton v. State,* 968 P.2d 636 (Colo.1998) (interpreting the Governmental Immunity Act, which

provides immunity from suit); *Lyons v. City of Aurora*, 87 P.2d 900 (Colo.App.1999) (also applying the Governmental Immunity Act).

In order for members of professional review committees to be immune from suit under CPRA, they must have made a reasonable effort to obtain the facts of the matter. Also, they must have acted in the reasonable belief that the action taken was warranted by the facts, and otherwise have acted in good faith. Witnesses and other participants in the professional review action must merely have acted in good faith. Section 12-36.5-105(1). For the governing board and its individual members to be immune from suit, they also must have acted in good faith. Section 12-36.5-105(2).

Good faith includes reliance on the recommendations of the professional review committee, and the reasonable belief that the action taken was warranted by the facts. Good faith will not be presumed if the board or a member has knowledge that would make reliance on the committee's recommendations unwarranted. Section 12-36.5-105(2).

A professional review committee must be composed of a majority of licensed physicians. Section 12-36.5-104(2), C.R.S.1999. For a professional review committee to be approved under the CPRA, it must operate according to written bylaws, policies, or procedures which are in compliance with CPRA and which have been approved by the committee's governing board. Section 12-36.5-104(4).

The bylaws of an approved professional review committee must provide the following safeguards: (1) a hearing if the findings of the committee are adverse to the

physician; (2) no person who has participated in the course of the investigation may be a member of the hearing committee; (3) the physician shall be given reasonable notice of the hearing and have the right to counsel; (4) after the hearing, the committee shall make recommendations to the governing board; and (5) a copy of the recommendations shall be given to the physician who then must have the right to appeal the committee's findings and recommendations to the governing board. Section 12-36.5-104(7).

The governing board must adopt written bylaws providing a right to appeal to the board. The physician must have the right to appear before the board, to be represented by counsel, and to offer such argument on the record as he or she deems appropriate. The bylaws may provide that the appeal be heard by a committee of not fewer than three members of the governing board. Section 12-36.5-104(8).

Section 12-36.5-104(7)(b) provides that:

> *Any person who has participated in the course of any investigation shall be disqualified as a member of the committee at any hearing held pursuant to paragraph (a) of this subsection (7),* but such person may participate as a witness in such hearing. (emphasis added)

Subsection (7)(a) states in relevant part that:

> If the findings of any investigation indicate that the physician who is the subject of the investigation is lacking in qualifications, has provided substandard or inappropriate patient care, or has exhibited inappropriate professional conduct, *the professional review committee shall hold a*

> *hearing . . . to consider the findings; except that, if the professional review committee is submitting its findings to another professional review committee for review, only one hearing shall be necessary prior to any appeal before the governing body.*

Section 12-36.5-104(7)(a) (emphasis added).

Here, the defendants admit that two individuals were members of the Credentials Subcommittee which investigated Nicholas and of the House Committee which recommended the suspension of Nicholas' privileges. In addition, one of these individuals was a member of the Board of Directors which adopted the House Committee's recommendation.

The defendants maintain that despite the multiple roles of these individuals, the House Committee was not required to comply with § 12-36.5-104(7)(b), because it is not a "professional review" committee. Although we conclude that the House Committee acted as an arm of the governing body, rather than as a professional review committee, we nevertheless conclude as a matter of law that the statute was violated and that the procedures afforded Nicholas did not comply with the requirements of CPRA.

CPRA maintains a clear distinction between professional review or peer review committees and the governing body that makes the final decision. *See* § 12-36.5-103(1), C.R.S.1999; § 12-36.5-104(7)(a), (d), and (e); § 12-36.5-104(8)(a); § 12-36.5-104(10)(a); § 12-36.5-104(12); § 12-36.5-104(13); § 12-36.5-104(14); and § 12-36.5-105.

This distinction between professional review committees and the governing body, together with the specific requirement that investigators not sit on a hearing held by the professional review committee, leads us to the conclusion that CPRA requires that no participant in the investigation be a member of the body hearing the appeal from the investigation.

The Board of Directors, as NCMC's governing body, was responsible for the final decision to suspend Nicholas' privileges. The House Committee was appointed by the Board, and recommended that Nicholas' privileges be suspended. Thus, while the final decision on privileges was left to the Board of Directors, the House Committee acted as an arm of the governing board of NCMC for the purposes of § 12-36.5-104(8)(b).

We have previously concluded that allowing members of the Credentials Subcommittee also to participate in the decisions of the House Committee and the Board of Directors violated the due process required by the Constitution. *See deKoevend v. Board of Education, supra.* We construe CPRA as affording the same protection.

The construction pressed by defendants – that the House Committee was not required to comply with § 12-36.5-104(7)(b) because it is not a professional review committee – would allow individuals who participated in the investigation of disciplinary charges against a physician also to serve on the deliberative body that recommended sanctions against that physician. In our view, it would render CPRA unconstitutional under the Due Process Clauses of the United States and Colorado Constitutions. *See deKoevend v. Board of Education, supra.*

When two statutory constructions are possible, one constitutional and the other unconstitutional, we must choose the one that renders the statute constitutional. *See Kinder v. Industrial Claim Appeals Office*, 976 P.2d 295 (Colo.App.1998).

We therefore conclude as a matter of law that the procedures employed by NCMC violated the due process required by CPRA. Hence, the trial court erred in finding that NCMC's procedures were in substantial compliance with CPRA.

VI. Conclusion

In summary, we conclude that the defendants are state actors for the purposes of § 1983 liability, and that Nicholas has pled facts sufficient to support such a violation because the procedures provided to him by NCMC violated the due process required by the federal Constitution.

As to Nicholas' state claims, we conclude there are genuine issues of material fact which preclude summary judgment on the issue of defendants' statutory immunity under HCQIA. With regard to the issue of immunity under CPRA, we further conclude as a matter of law that the procedures provided to Nicholas by defendants violated the due process required by CPRA. Accordingly, statutory immunity is unavailable to defendants under CPRA on Nicholas' state claims.

The judgment is reversed, and the cause is remanded for further proceedings consistent with the views set forth in this opinion.

Judge JONES and Judge BRIGGS concur.

BEFORE THE COMMITTEE ON ANTICOMPETITIVE CONDUCT

STATE OF COLORADO

Case No. CAC 1092001

FINAL COMMITTEE ORDER

IN THE MATTER OF WILLIAM JOHN NICHOLAS, M.D., F.A.C.C.,

Complainant,

v.

NORTH COLORADO MEDICAL CENTER, INC., a Colorado not for profit corporation, and the GOVERNING BOARD OF DIRECTIONS OF THE NORTH COLORADO MEDICAL CENTER,

Respondents.

The evidentiary hearing required by § 12-36.5-106(9), C.R.S. was held on May 12, 1993. On May 19, May 24, and July 12, 1993, the Committee on Anticompetitive Conduct ("Committee") met to deliberate upon the final order to be issued. Having carefully considered the record below, as well as the testimony and other evidence admitted at the evidentiary hearing, the Committee makes the following findings of fact and conclusions of law:

Background and Case History

1. The Complainant is an invasive cardiologist. In August of 1989 he joined the Greeley Medical Clinic ("Clinic"), located in Greeley, Colorado. At that time,

Complainant was one of four invasive cardiologists associated with the Clinic. These cardiologists provided most, if not all, of the invasive cardiology services in the Greeley area.

2. Coincident with his joining of the Greeley Medical Clinic, Complainant also joined the medical staff of the Respondent, North Colorado Medical Center ("Medical Center"), also located in Greeley. He was granted provisional status which included privileges in invasive cardiology, and unlimited use of the Medical Center's cardiac catheterization laboratory (hereinafter referred to as the "cath lab"). At all times relevant to this complaint, the Medical Center's cath lab was the only facility of its kind in the Greeley area. Since only the cath lab had the equipment and trained personnel necessary to perform invasive cardiology procedures, it was an essential tool for the invasive cardiologist.

3. There was considerable unrest among the cardiologists associated with the Clinic, and in approximately September of 1990, largely at the instigation of another invasive cardiologist, Dr. James Beckmann, Complainant's contract with the Clinic was terminated. Although Complainant's termination from the Clinic did not directly affect his status at the Medical Center, there ensued over the following months a series of actions by various committees at the Medical Center which purported to evaluate the Complainant's competence as an invasive cardiologist. In July, 1991, based upon a recommendation of the Medical Center's Credentials Subcommittee, Complainant was denied privileges to use the cath lab, and his invasive cardiology privileges were summarily suspended pending further investigation and

preparation of a Corrective Action Report by the Credentials Subcommittee. The Corrective Action Report was published in November, 1991, and recommended that Complainant not be granted privileges to practice invasive cardiology.

4. Pursuant to the Medical Center's bylaws, Complainant was granted a hearing, which was conducted on March 9, 11, and 12, 1992 (hereinafter, "the Fair Hearing"). The Fair Hearing Panel concluded that many of the allegations of substandard care had not been proven, and that although Complainant exhibited significant technical deficiencies early in his practice at the Medical Center with respect to acute interventional angioplasty, his practice had improved to the point where his judgment and proficiency were within generally acceptable standards. The Fair Hearing Panel's only current criticism centered upon deficiencies in Complainant's record keeping practices. The Fair Hearing Panel therefore recommended that Complainant's privileges be reinstated, including privileges in the cath lab, subject to a one year period of probation and monitoring to include a review of his record keeping practices.

5. The Fair Hearing Panel's report was reviewed by the House Committee to the Board of Directors. On May 6, 1992 the House Committee voted to reject the Fair Hearing Panel's recommendations, and to instead recommend to the Board of Directors that Complainant not be granted invasive cardiology privileges. This recommendation was adopted by the Board of Directors on May 26, 1992.

6. On June 25, 1992, Complainant filed his verified complaint with the Committee.

The Complaint

7. Complainant alleges that the loss of his invasive cardiology privileges at the Medical Center resulted from unreasonable anticompetitive conduct. Specifically, he says that another invasive cardiologist, Dr. James Beckmann, set out to eliminate Complainant as a competitor. He contends that Dr. Beckmann had a plan to dominate the field of invasive cardiology in northeastern Colorado, and that to effectuate that plan he initiated and sustained a course of unfair criticism and derogation of Dr. Nicholas's professional practices.

8. Complainant further alleges that by virtue of Dr. Beckman's power and position within the Greeley medical community, he was successful in enlisting the knowing or unwitting aid of a number of individuals associated with the Medical Center, to the end that the peer review process within the Medical Center was unfairly focused upon Complainant.

9. According to Complainant, Dr. Beckmann's efforts resulted in a concert of action which culminated in the suspension and eventual termination of Complainant's invasive cardiology privileges and privileges in the cath lab. Without such privileges Complainant is effectively precluded from the marketplace, resulting in an adverse impact upon competition within the Greeley area.

Assignment of Burden of Proof

10. Prior to the hearing, Respondent moved to formally assign the burden of proving the existence of unreasonable anticompetitive conduct to the Complainant. After considering the briefs filed by both sides, the Committee ruled that the Complainant must bear the burden of proving, by a preponderance of the evidence, that the final action of the governing board resulted from unreasonable anticompetitive conduct.

The Elements of Unreasonable Anticompetitive Conduct

11. The Committee's role under its enabling statute is limited. It is empowered by §§ 12-36.5-106(7) and (9), C.R.S. to review the final action of a governing board only to see if the action resulted from unreasonable anticompetitive conduct. If the Committee does not find the governing board's final action resulted from unreasonable anticompetitive conduct, it may not set aside or modify the action, regardless of any perceived errors or injustices in the peer review process. The Committee is not empowered to second guess the correctness of the governing board's action, except as to the limited issue of unreasonable anticompetitive conduct.

12. The term "unreasonable anticompetitive conduct" is not defined within the Committee's enabling statute. However, in view of the legislative declaration of § 12-36.5-101, C.R.S., and the statute's legislative history, the term "unreasonable anticompetitive conduct" must be defined by reference to principles of antitrust law, as applied to the health care field. With this in mind, the Committee finds that Complainant must establish the

following four elements before the Committee may find that the final action of the governing board resulted from unreasonable anticompetitive conduct:

a. First, there must be a contract, combination or conspiracy. In other words, there must be concerted action of two or more persons or entities. A lone actor is not enough. However, express agreement among participants is not necessary if there is knowledge of the plan and acquiescence in it.

b. Second, an adverse effect upon competition must either have been intended, or have resulted, from the concerted action. This requires analysis of the relevant market, since loss of a single competitor may not be enough to adversely affect competition.

c. Third, the anticompetitive conduct must be *unreasonable*. That is to say, the Committee must apply the well recognized "rule of reason" test, and balance the procompetitive or socially legitimate purpose of the conduct against its anticompetitive effects. Peer review which is undertaken for the purpose of quality assurance, and thus protection of patient health, safety, and welfare, is legitimate conduct, and will normally outweigh the anticompetitive effects which may result. Therefore the Committee will not find that concerted action is unreasonable anticompetitive conduct if the dominant purpose of the concerted action is quality assurance.

d. Finally, the final action of the governing board must have resulted from the unreasonable anticompetitive conduct. This is essentially an issue of proximate cause. That is to say, the Committee must find that the

final action would not have occurred "but for" the unreasonable anticompetitive conduct.

Analysis of the Evidence

13. *Contract, Combination, or Conspiracy.* Concerted action is rarely proven by frank admission of the conspirators. More commonly, if concerted action exists, proof must be found in circumstantial evidence which reasonably supports the conclusion that people were acting together. Such is the case here. The Committee finds from the circumstances, together with the reasonable inferences to be drawn therefrom, that there was concerted action between Dr. Beckmann and one or more employees or agents of the Medical Center. Among the circumstances which support this conclusion are:

a. Dr. Beckmann was a strong force in the Greeley medical community. For a time, he was a general partner in the Greeley Medical Clinic and head of its cardiology department. He became the medical director of the Medical Center cath lab, and head of the Medical Center's cardiology department. He was known to be a strong personality who was influential in the medical community. One physician even went so far as to characterize him as a "dictator".

b. Dr. Beckmann was opposed to Complainant's recruitment into Greeley, and from the outset had a hostility toward Complainant which he openly exhibited. Dr. Beckmann's low opinion of Complainant subjectively affected the opinions of personnel in the cath lab and in the opinion of the cath lab supervisor may have caused cath lab personnel to overscrutinize the care rendered by

Complainant. Knowledge of Dr. Beckman's dislike for Complainant also spread within the Medical Center to the point where at least one physician advised an associate to not refer patients to the Complainant. At Dr. Beckmann's urging, Dr. Marsh, another cardiologist, agreed to the termination of Complainant's contract with the Clinic even though Dr. Marsh was personally comfortable with the quality of Complainant's medical practice.

c. In June of 1991, Dr. G. David Jang was invited by the Medical Center to conduct an outside review of Complainant's performance in the cath lab. At some point during his review, one or more Medical Center employees provided Dr. Jang with a written summary of Complainant's professional competence which, in the Committee's opinion, was unfairly slanted and biased against the Complainant. Respondents have not offered adequate explanation as to why this material was provided to Dr. Jang. The Committee finds that provision of this document to the outside reviewer was contrary to good peer review, and is evidence of a plan to bias Dr. Jang's opinion against Complainant.

d. For reasons not adequately explained to the Committee, Dr. Jang was asked to meet with Dr. Beckmann, but not with Dr. Marsh, even though Dr. Marsh was in far better position to provide objective information about Complainant's professional performance. Although Dr. Beckmann was, at the time, the cath lab medical director, he had very little professional oversight of Complainant's practice, whereas Dr. Marsh, as Complainant's proctor, did. Dr. Marsh was known at the time to hold opinions generally favorable to Complainant. The fact he was isolated from Dr. Jang while Dr. Beckmann was not

is, again, evidence of an intent to cast the Complainant in a negative light. Although Dr. Beckmann testified that he spoke with Dr. Jang only about cath lab policies and procedures, and not about the Complainant, the Committee finds this unlikely. But regardless of whether Dr. Beckmann did or did not express his opinions of Complainant to Dr. Jang, the Committee finds the fact that Dr. Jang was asked only to speak to Dr. Beckmann and not to Dr. Marsh indicative of a plan to influence the peer review process against Complainant.

e. Early in the peer review process, it was believed that Complainant had improperly altered an EKG report, a belief which reflected adversely upon his professional ethics. Although Complainant had not improperly altered the EKG report, and this fact was apparently known by certain employees within the peer review process, the misinformation was allowed to linger, uncorrected, until after the Credentials Subcommittee had published its Corrective Action Report. The handling of this misinformation again raises a reasonable inference that the peer review process was being unfairly skewed against the Complainant.

f. Both the Quality Assurance Committee, and subsequently the Fair Hearing Panel, recommended proctoring and monitoring of Complainant as opposed to the more severe remedy of termination of his invasive cardiology and cath lab privileges. Nevertheless, the Credentials Committee took the position, both before and after the Fair Hearing, that Complainant's invasive cardiology privileges should be denied. In fact, when the Fair Hearing Panel published its findings and recommendations, the Credentials Subcommittee took the initiative to file

with the House Committee a rebuttal to the Fair Hearing Panel's report, again urging termination of Complainant's invasive cardiology privileges. The Committee finds this disturbing. The Fair Hearing Panel was an exceptionally qualified and unbiased panel of non-competitor physicians who performed a very conscientious and thorough review of the available evidence. The Fair Hearing Panel's recommended corrective action was a reasonable response to the perceived inadequacies in Complainant's practice. Furthermore, this less restrictive alternative to outright termination of Complainant's invasive cardiology privileges would not have had the effect of excluding Complainant from the invasive cardiology market. The Board of Directors had the discretion to disagree with the Fair Hearing Panel's recommendations, and mere disagreement is not conclusive proof of unreasonable anticompetitive conduct. However, in light of all the other circumstances, the Credentials Subcommittee's strong opposition to, and the Board's rejection of, the Fair Hearing Panel's recommendations tend to support Complainant's argument that there was a concert of action to remove him from the Greeley medical scene.

g. Finally, the Committee notes that one voting member of the Credentials Subcommittee was also a voting member of the House Committee. During the peer review process, Complainant's counsel unsuccessfully sought to have this member excused from participating in the House Committee's deliberations. Although the Committee was not presented with any evidence that this member improperly influenced the House Committee, it

is disquieting that a member of the Credentials Subcommittee, which was so obviously invested in accomplishing the denial of Complainant's invasive cardiology privileges, was permitted over objection to participate in the House Committee's deliberations.

14. No single circumstance is sufficient, standing alone, to prove concerted action. However, the Committee is convinced by the totality of the circumstances, and by its assessment of the credibility of the witnesses, that Dr. Beckmann did have a plan to eliminate the Complainant from the practice of invasive cardiology in the Greeley area, and that one or more persons involved in the peer review process within the hospital knew of his desires and joined in his plan. Although the Committee was presented with no evidence that Dr. Beckmann directly participated in the Medical Center's action against Complainant, the Committee is convinced that, by his behavior, he significantly influenced the opinions of others who were responsible for the initiation and course of the peer review process.

15. *An Adverse Effect Upon Competition.* The Committee finds that the relevant geographical market in this case is Greeley and its surrounding area. Although cardiac catheterization capability exists in Fort Collins and Denver, the patient catchment area for these centers does not, for the most part, overlap. Within the Greeley area, the principal, if not only, place where an invasive cardiologist can practice his profession is in the Medical Center and its cath lab. Thus when the Medical Center denied Complainant's invasive cardiology privileges, his ability to compete in the invasive cardiology market was destroyed.

16. After Complainant's termination from the Greeley Medical Clinic, he became a direct competitor to Dr. Beckmann and the other cardiologists. Since Complainant was one of only a few physicians practicing invasive cardiology in the Greeley area, his elimination from that small and localized geographical market did have an adverse effect upon competition.**[1]

17. *Unreasonable Anticompetitive Conduct: The Rule of Reason*. One of the purposes of the Committee's enabling statute is to foster bona fide peer review. Therefore peer review actions which are conducted in good faith will generally not be deemed unreasonable anticompetitive conduct even though they result in the elimination of a competitor. Sadly, the Committee is compelled to conclude that the dominant purpose of the concerted action identified above was not quality assurance. Rather, the Committee finds that Dr. Beckmann was principally motivated by personal hostility toward Complainant, and that this motive was shared by those acting in concert with him. Although the Committee is not convinced that Dr. Beckmann, or anyone else, specifically intended to eliminate Complainant to gain a competitive advantage, a "dollars and cents" motive is not essential to a finding of unreasonable anticompetitive conduct. A personal agenda, whether motivated by money or animosity, is

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1** While the peer review process against Complainant was pending, the Medical Center recruited two additional cardiologists to Greeley. At least one of the recruitments was undertaken at Dr. Beckmann's request. Despite the entrance of two additional cardiologists into the Greeley market, the total number was still very small.

simply inadequate to outweigh the adverse effect upon competition.

18. Motivation must frequently be discovered in circumstantial evidence. Among the circumstances important to the Committee's finding that the concerted action was not motivated by good faith quality assurance are:

a. Dr. Beckmann formed and expressed an animosity toward Complainant either before or shortly after the Complainant's arrival in Greeley. Furthermore, Dr. Beckmann's personal observation of Complainant's professional practice was very limited, making it unlikely that he had a basis for genuine concern about the quality of Complainant's practice.

b. Dr. Beckmann's personal dislike for complainant was well known. The sentiment was strong enough that one cath lab technician even advised Complainant that he shouldn't let Dr. Beckmann run him out of the cath lab.

c. Several circumstances, including those described in paragraphs 13.c., d., e., and f., above, indicate an intent by Medical Center employees to "make a case" against Complainant rather than achieve objective quality assurance.**[2]

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[2]** The Committee does not wish to imply that most, or even many, of the people involved in the Medical Center's peer review process were motivated by any reason other than a desire for quality assurance. The Committee is convinced, however, that a small minority were principally motivated by personal hostility, rather than quality assurance.

d. The less restrictive alternatives recommended by the Fair Hearing Panel were rejected by the Board of Directors, and a substantially more severe sanction imposed.

19. *The Final Action of the Board Resulted From Unreasonable Anticompetitive Conduct.* The Committee finds that but for the concerted effort of Dr. Beckmann and others, the final action of the governing board would not have resulted. By his behavior, he sowed seeds of ill-feeling about Complainant amongst the cath lab staff and others associated with the Medical Center. Because Dr. Beckmann was known to be a force to be reckoned with in the hospital, other people heeded his opinion. By his behavior, he encouraged much greater scrutiny of Complainant than otherwise would have been the case. As a consequence, a multitude of variance reports were filed against Complainant which, in the words of the Fair Hearing Panel report, were "minor if not trivial." Although some bona fide concerns about Complainant's practice were identified, as noted by the Fair Hearing Panel, the severe ultimate action taken by the Board of Directors was the result of a slanted perspective of Complainant borne of the concerted action of Dr. Beckmann and those who shared his perspective. Had the peer review process not been so infected, the ultimate corrective action would have been far less severe, and in all likelihood would not have destroyed Complainant's ability to compete in the field of invasive cardiology.

20. *Summary.* The Committee therefore finds, by a preponderance of the evidence, that the final action of the Board of Directors of the North Colorado Medical Center resulted from unreasonable anticompetitive conduct.

IT IS THEREFORE ORDERED, in accordance with § 12-36.5-106(9)(k), C.R.S., tht the final action of the governing board be set aside.

SO ORDERED, 7/12, 1993.

BY THE COMMITTEE ON
ANTICOMPETITIVE CONDUCT

/s/ Neiel Baronberg, M.D.
NEIEL BARONBERG, M.D.
Chairman

/s/ Renate Justin, M.D.
RENATE JUSTIN, M.D.
Member

/s/ Stephen Hoffenberg, M.D.
STEPHEN HOFFENBERG, M.D.
Member

/s/ John Haws, M.D.
JOHN HAWS, M.D.
Member

/s/ B. LAWRENCE THEIS
B. LAWRENCE THEIS, ESQ.
Member

AG Alpha No. RG CA DLGRE
AG File No. E9308801.193

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 14th day of July, 1993 placed a true and correct copy of the Final Committee Order in the matter of William John Nicholas, M.D., F.A.C.C., Complainant, versus North Colorado Medical Center, Inc., and the Governing Board of Directors of the North Colorado Medical Center, Respondents, in the United States mail, postage paid thereon, addressed to:

Philip Nicholas, Esq.
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650 South Cherry, Suite 700
Denver, Colorado 80222

/s/ Mary J. Urling
Mary J. Urling
Secretary

DISTRICT COURT, COUNTY OF WELD,
STATE OF COLORADO

Case No. 92 CV 447 Div. IV

ORDER RE: MOTION TO DISMISS

WILLIAM JOHN NICHOLAS, Plaintiff-Appellant,

v.

NORTH COLORADO MEDICAL CENTER, INC. et. al., Defendant-Appellees.

I

The Court has reviewed the complaint, Defendants' motion to dismiss, Plaintiff's traverse and response, Defendants' Reply, and Plaintiff's report and traverse. The complaint seeks judicial review of disciplinary action taken by the Defendants. Defendants' moved to dismiss for lack of jurisdiction and for failure to state a claim.

Defendant alleges that it is a private hospital and that as a private hospital the Court has no jurisdiction to interfere with its management decisions. Further that as a private hospital it is not subject to claims of violation of due process and equal protection rights because no state action is involved. Plaintiff denies that Defendant is a private hospital.

The distinction between a private and a public hospital was discussed by the Supreme Court in *Colo. Ass'n of Pub. Emp. v. Board of Regents* (Colo.1990) 804 P2d 138. Whether a hospital "may be considered private depends upon whether 1) it is founded and maintained by private individuals or a private corporation and 2) the state is

involved in the management or control of its property or internal operations."

I cannot resolve, on the basis only of the pleadings, whether defendant is a private or public hospital. That issue requires more evidence than I now have – either by way of affidavit or from an evidentiary hearing.

However, I do not believe that it makes any difference whether NCMC is private or public.

II

If further appears from the pleadings that the action of defendants was taken through a professional review committee which was intending to act under the auspices of CRS 12-36.5-101 et. seq. If that is the case, then regardless of the status of defendant as private or public the actions of its committee, is by legislative fiat, declared to be state action. CRS 12-36.5-103(3)(a). The governing board of NCMC is a "governing board" as that term is defined in CRS 12-36.5-102(2). The process and procedures for hearings and appeals is spelled out in the statute CRS 12-36.5-104, 106. The exclusive appeal, where it is alleged that the action of the governing board resulted from unreasonable anticompetitive conduct, is to the Committee on Anticompetitive Conduct, an independent committee of the board of medical examiners. CRS 12-36.5-104(7). Review of the anticompetitive committee decision is by appeal to the Court of Appeals. CRS 12-36.5-106(10)(a). A challenge to the final action of a governing board, other than for anticompetitive conduct, is to the district court. CRS 12-36.5-106(10)(b).

The clear import of CRS 12-36.5-101 et seq. is to make the licensure, discipline, and professional review of persons licensed to practice medicine a matter of state control. Professional review committees act as an arm or division of the state board of medical examiners. Actions of a professional review committee are subject to judicial review in accord with the statute. Thus, this Court has jurisdiction to consider plaintiff's complaint, except as regards unreasonable anticompetitive conduct.

As I read the statute, review in the district court need not be initiated until final administrative action has been taken by the anticompetitive committee. Plaintiff recognized this when he filed his complaint. (paragraph 2). Under the circumstances, plaintiff having already filed his complaint, this action should be held in abeyance until the anticompetitive committee has taken final administrative action.

Within twenty (20) days after the anticompetitive committee has taken final administrative action the plaintiff shall file an amended complaint eliminating any claim based on anticompetitive conduct. Defendants shall have twenty (20) days thereafter in which to answer or otherwise plead to the amended complaint.

III

IT IS ORDERED:

Defendants' motion to dismiss is denied.

This action is abated pending final administrative action by the anticompetitive committee.

Dated: March 2, 1993

/s/ William L. West
William L. West
District Judge

SUPREME COURT, STATE OF COLORADO Two East 14th Avenue Denver, Colorado 80203 Certiorari to the Colorado Court of Appeals Court of Appeals No. 98CA1407	)	Case No. 00SC418

Petitioners:

NORTH COLORADO MEDICAL CENTER, INC., a Colorado corporation, commonly referred to as NCMC, and its Board of Directors; RICHARD H. STENNER, its President, KARL B. GILLS, its Executive Vice-President; ALYCE KANTNER, its former Director of Medical Services; PAT (WILSON) KERN, its Director of Cardiovascular Services; and DEFENDANTS DOE 1 and 15,

Respondent:

WILLIAM JOHN NICHOLAS.

ORDER OF COURT

Upon consideration of the Respondents Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that the Opinion is Modified, and, as Modified, said Petition shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, AUGUST 6, 2001.

[SEAL]

cc:

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THIRD READING
OF
HOME RULE CHARTER
FOR
WELD COUNTY, COLORADO

Presented to the County Commissioners
July 2, 1975

* * *

Section 3-8 – Powers and Duties.

(1) The Board of County Commissioners shall be the governing body of the County. It shall exercise all the powers and perform all the duties now required or permitted or that may hereafter be required or permitted by State law to be exercised or performed by County Commissioners in either home rule or non-home rule counties.

(2) It shall exercise all powers of the County to determine policy and to enact legislation.

(3) It shall be responsible for the proper exercise by the County departments and other agencies established by this Charter or by the Board for all executive and administrative powers and duties delegated thereto.

(4) Without limiting the generality of the foregoing or diminishing the total authority and responsibility of the Board as herein provided, the powers and duties of the Board shall include duties and powers to:

(a) Perform or provide for the performance of any duties and responsibilities required by statute or the Constitution of Colorado of

County Commissioners in home rule counties and non-home rule counties.

(b) Enact legislation including such means of enforcement thereof as shall be authorized by law, and otherwise formally promulgate county policy. Unless otherwise required by statute, the Board shall act only by ordinance in matters of legislation, contracts, appropriations, and disposition of real property, and by ordinance, resolution or motion, as may be appropriate, in other matters.

* * *

(4) The Board of Public Health shall adopt by-laws which shall state the purposes of the Board and shall at least:

(a) Provide for the selection of its officers, and for appointment of standing and special committees necessary to effect the discharge of its responsibilities.

(b) Provide for the adoption of a schedule of meetings and attendance requirements.

(c) Require that minutes be kept of the Board of Public Health deliberations and decisions.

(d) Require five members constitute a quorum.

(e) Provide for studying county health programs and direct their implementation in cooperation with the Director of Public Health and the Board of County Commissioners.

(B) Hospital Division.

(1) Except as provided herein, the administration of Weld County General Hospital shall remain as provided by law and the rules and regulations of the Board of Trustees, and they shall be directly responsible to the Board of County Commissioners.

(2) Members of the Hospital Board of Trustees shall be appointed for three-year terms and no person shall serve more than two consecutive terms.

(3) The County Attorney shall represent and advise the Board of Trustees.

(C) Other Divisions.

The Department of Health Services shall contain such other divisions as may from time to time be established by the Board, and shall perform such functions and duties as may from time to time be assigned or reassigned to it.

* * *

MAIL TO

Colorado Secretary of State
Corporations Office
1575 Sherman St., 2nd Floor
Denver, CO 80203
(303) 866-2361

ARTICLES OF INCORPORATION

OF

NORTH COLORADO MEDICAL CENTER, INC.
(A Colorado Nonprofit Corporation)

The undersigned person acting as incorporator of a corporation under the Colorado Nonprofit Corporation Act signs, and, acknowledges the following Articles of Incorporation for such corporation.

FIRST: The name of the corporation is: North Colorado Medical Center, Inc.

SECOND: The period of duration is PERPETUAL.

THIRD: The purpose or purposes for which the corporation is organized are to operate exclusively for charitable, benevolent, educational and scientific purposes. Without in any way limiting the foregoing general purpose, the specific purposes of the corporation shall be to qualify as an organization exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code of 1954, as amended, the regulations promulgated pursuant thereto, or the corresponding provision of any applicable future United States Internal Revenue law or regulations (collectively, the "Code"), and as a public charity under Section 509(a)(1) of the Code; to establish and maintain one or more hospitals as institutions with permanent facilities

for diagnosis and treatment of both inpatients and outpatients and to provide hospital services; to develop related facilities for or arrangements for the provision of urgent care, extended care, home care and other health care services; to foster the teaching and research functions of such hospitals and related facilities in cooperation with other health care and educational institutions; and for any and all other lawful purpose or purposes for which a nonprofit corporation may be organized in the State of Colorado; provided, however, that the corporation shall not engage in activities that are not in furtherance of its charitable purposes other than as an insubstantial part of its activities.

FOURTH: The address of the initial registered office of the corporation in Colorado is 1801 16th Street, Greeley, Weld, CO 80631-5199 and the name of its initial registered agent at that address is Richard H. Stenner.

FIFTH: The address of the principal office is 1801 16th Street, Greeley, Weld, CO 80631-5199.

SIXTH: The number of directors constituting the initial board of directors is three (3), and the names and addresses of the persons who are to serve as the initial directors are:

Name	Address	Term End
Richard H. Stenner	1801 16th Street Greeley, Weld CO 80631-5199	1985
Dennis L. Kohan	1801 16th Street Greeley, Weld CO 80631-5199	1985
James M. Kadlecek	1801 16th Street Greeley, Weld Co 80631-5199	1986

which persons shall hold office until the conclusion of the annual meeting of the Board held in the year set opposite their names and until their successors are elected and have qualified, or until their sooner death, resignation or removal.

SEVENTH: The sole Member of the corporation shall be NORMEDCO, Inc., a Colorado nonprofit corporation (the "Corporate Member").

EIGHTH: No part of the net earnings of the corporation shall inure to the benefit of, or be distributable to its Directors, Officers, or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in Article THIRD hereof. No substantial part of the activities of the corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of any candidate for public office. Notwithstanding any other provision of these Articles, the corporation shall not carry on any activities not permitted to be carried on (a) by a corporation exempt from federal income tax under Section 501(c)(3) of the Code, or (b) by a corporation, contributions to which are deductible under Section 170(c)(2) of the Code.

NINTH: In the event of the dissolution of the corporation or the winding up of its affairs, or other liquidation of its assets, the board of directors shall, after paying or making provision for the payment of all liabilities of the

corporation, convey or distribute all other assets of the corporation to another organization or organizations selected by the Corporate Member provided, however, that such organization or organizations must, at the time of such conveyance or distribution, qualify as an exempt organization or organizations under Section 501(c)(3) of the Code, and as a public charity or public charities under Section 509(a) of the Code.

TENTH: The Bylaws of the corporation shall initially be made and adopted by its first board of directors. The Bylaws may thereafter be altered, amended or repealed, and new and other Bylaws may be made and adopted only by the Corporate Member.

ELEVENTH: Amendments to these Articles may be made and adopted only by the Corporate Member.

Incorporator) /s/ Karen E. Leaf
Karen E. Leaf
233 W. Masonic
Cripple Creek, Teller,
CO 80813

State of Colorado)
County of Teller)

Acknowledged before me this 27th day of November, 1984 by Karen E. Leaf of North Colorado Medical Center, Inc.

My commission expires May 24, 1988

/s/ Elizabeth Kings
Notary Public
218 E. Bennett, Cripple
Creek, Teller, CO 80813

SECOND
AMENDED AND RESTATED ARTICLES OF INCORPORATION
OF
NORTH COLORADO MEDICAL CENTER, INC.

(a Colorado non-profit corporation)

Pursuant to the provisions of the Colorado Nonprofit Corporation Act, the undersigned corporation, having filed its original Articles of Incorporation with the Colorado Secretary of State on November 28, 1984 and Amended and Restated Articles of Incorporation on January 13, 1986, hereby adopts the following Second Amended and Restated Articles of Incorporation amending the prior Articles and correctly setting forth the provisions of the Articles of Incorporation, having been fully adopted as required by law and supersede the original Articles of Incorporation, the Amended and Restated Articles of Incorporation, and all amendments thereto:

ARTICLE I
NAME

The name of the corporation shall be NORTH COLORADO MEDICAL CENTER, INC.

ARTICLE II
MANNER OF ADOPTION

These amended and restated Articles of Incorporation were adopted on the 24th day of August, 1987, by a

majority of the Directors of the corporation there being no members, or no members entitled to vote thereon.

ARTICLE III
DURATION

The duration of the corporation shall be perpetual.

ARTICLE IV
PURPOSE

The corporation is organized and to be operated exclusively for charitable, educational, and scientific purposes. Without in any way limiting the foregoing general purpose, the corporation

* * *

ARTICLE XI
TRANSACTIONS WITH INTERESTED DIRECTORS

No contract or other transaction between the corporation and one (1) or more of its Directors or any other corporation, firm, association, or entity in which one (1) or more of its Directors are Directors or officers or are financially interested shall be either void or voidable solely because of such relationship or interest, or solely because such Directors are present at the meeting of the Board of Directors or a committee thereof which authorizes, approves, or ratifies such contract or transaction, or solely because their votes are counted for such purpose it:

A. The fact of such relationship or interest is disclosed or known to the Board of Directors or committee which authorizes, approves, or ratifies the contract or

transaction by a vote or consent sufficient for the purpose without counting the votes or consents of such interested Directors; and

B. The contract or transaction is fair and reasonable to the corporation.

Common or interested Directors may be counted in determining the presence of a quorum at a meeting of the Board of Directors or a committee thereof which authorizes, approves, or ratifies such contract or transaction.

ARTICLE XII

BYLAWS

The Bylaws of the corporation have been made and adopted by the Board of Directors. The Bylaws may hereafter be altered, amended, or repealed, and new or other bylaws may be made and adopted only by the Board of Directors.

ARTICLE XIII

AMENDMENTS TO ARTICLES OF INCORPORATION

These Articles of Incorporation may be amended by a majority vote of the Board of Directors at a meeting of the Board of Directors at which a quorum is present and duly called pursuant to the provisions of the Bylaws.

ARTICLE XIV

DISSOLUTION

In the event of the dissolution of the corporation or the winding up of its affairs, or other liquidation of its assets, the board of Directors shall, after paying or making provision for the payment of all liabilities of the corporation, convey and distribute all other assets of the corporation to the Board of County Commissioners, County of Weld, State of Colorado or its successors in interest and in the event the Board of County Commissioners, County of Weld, State of Colorado cease to exist without successors then to an organization or organizations which, at the time of the conveyance and distribution, qualify as tax-exempt organizations under Section 501(c)(3) of the Code, and as a Public Charity or Public Charities within the meaning of Section 5(9)(a) of the Code.

/s/ Richard H. Stenner
Richard H. Stenner, President

ATTEST:

_____
Secretary

ACKNOWLEDGEMENT

STATE OF COLORADO)
) SS
COUNTY OF WELD)

Subscribed and sworn to before me this 25 day of August, 1987 by RICHARD H. STENNER, as President of North Colorado Medical Center, Inc.

WITNESS my hand and official seal.

My commission expires: 8/28/90

Arlene Dirck
Notary Public, Arlene Dirck
1801 16th Street, Greeley,
Colorado 80631
Address
My Commission expires
August 28, 1990.

EMERGENCY ORDINANCE NO. 160

AN EMERGENCY ORDINANCE WITH RESPECT TO NORTH COLORADO MEDICAL CENTER: AUTHORIZING AN AMENDMENT TO THE GROUND LEASE TO THE COLORADO HEALTH FACILITIES AUTHORITY OF CERTAIN LANDS UPON WHICH SAID MEDICAL CENTER IS LOCATED; APPROVING THE AMENDMENT TO AND CONTINUED LEASING OF THE HOSPITAL FACILITIES BY SAID AUTHORITY TO THE BOARD OF TRUSTEES FOR NORTH COLORADO MEDICAL CENTER; APPROVING THE COLORADO HEALTH FACILITIES AUTHORITY VARIABLE RATE DEMAND HOSPITAL BONDS (NORTH COLORADO MEDICAL CENTER) SERIES 1990 AND THE PRELIMINARY OFFICIAL STATEMENT PERTAINING TO SAID BONDS AND ALSO MAKING OTHER PROVISIONS IN CONNECTION WITH THE FOREGOING.

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF WELD COUNTY, COLORADO:

WHEREAS, Weld County, Colorado (the "County") is a home rule county organized and existing under the Constitution and the laws of the State of Colorado; and

WHEREAS, under the provisions of Title 25, Article 3, Part 3 of the Colorado Revised Statutes, entitled "County Hospitals, Establishment," the Board of County Commissioners (the "Board") of the County established a body corporate under the name of "Board of Trustees for Weld County General Hospital," now known as the Board

of Trustees for North Colorado Medical Center (the "Hospital"), which operates the North Colorado Medical Center (the "Hospital Facilities") located on land owned by the County; and

WHEREAS, the County, pursuant to Emergency Ordinance No. 75 adopted and approved by the Board on December 18, 1985 (the "Original Ordinance"), has previously leased certain real property (the "Land") containing the Hospital Facilities to the Colorado Health Facilities Authority (the "Authority") pursuant to a Ground Lease, dated as of December 1, 1985 (the "Original Ground Lease"), between the County and the Authority, in connection with the issuance by the Authority of its Hospital Refunding Revenue Bonds (North Colorado Medical Center) Series 1985 (the "Series 1985 Bonds") pursuant to a Trust Indenture, dated as of December 1, 1985 (the "Original Indenture"), between the Authority and United Bank of Denver National Association, as successor in trust to IntraWest Bank of Greeley, N.A., as trustee (the "Trustee"); and

* * *

appears that the Supplemental Ground Lease, the First Supplemental Lease, the Second Supplemental Lease, the Standby Bond Purchase Agreement, the Reimbursement and Indemnity Agreement, the Restated Sublease, the Bond Purchase Agreement, the Indemnity Letter and the Remarketing Agreement are appropriate instruments to be executed and delivered by the County and the Hospital, as appropriate, for the purposes intended; and

WHEREAS, in order to further promote the health and welfare of the residents of the County and the surrounding territory, it may become necessary in the future to restructure the current relationships among the County, the Hospital and the Corporation and change the ownership of the Hospital Facilities; and

WHEREAS, the financial consultants to the Hospital and the Underwriter of the Series 1990 Bonds have advised that the sale of the Series 1990 Bonds will be made during the week of November 5, 1990, so as to sell the Series 1990 Bonds at a time that is most opportune to obtain a favorable rate of interest and to obtain liquidity and credit enhancement on the Series 1990 Bonds; and

WHEREAS, in order to sell the Series 1990 Bonds during the week of November 5, 1990, it is necessary to have the form of the Bond Purchase Agreement approved by the Board of County Commissioners of Weld County and the Hospital Board on or about October 29, 1990; and

WHEREAS, in order to make this Ordinance effective within the required time schedule, it is necessary that it be and it is hereby declared to be an emergency ordinance.

NOW, THEREFORE, BE IT ORDAINED by the Board of County Commissioners of Weld County, Colorado as follows:

This is an emergency ordinance which shall be effective on adoption as provided in Article III, Section 3-14, of the County's Home Rule Charter. Public notice of this Ordinance shall be given forthwith. Without such procedure, the Ordinance could not be considered and

finally adopted so as to accommodate a sale of the Series 1990 Bonds during the week of November 5, 1990, in order to obtain a favorable rate of interest and to obtain liquidity and credit enhancement on the Series 1990 Bonds.

Section 1. Supplemental Ground Lease. In order to accomplish the foregoing transactions and in order for the Authority to accomplish the financing contemplated by the Preliminary Official Statement, the County, upon receiving

* * *

immediate passage is necessary to obtain a favorable interest rate, liquidity and credit enhancement on the Series 1990 Bonds and is necessary for the preservation and protection of the public health and welfare.

The above and foregoing Emergency Ordinance No. 160 was, on motion duly made and seconded, adopted by the following vote on the 31st day of October, 1990.

ATTEST:
/s/ Donald D. Warden
Weld County Clerk
to the Board

BY: /s/ Tommie Antuna
Deputy Clerk to
the Board

BOARD OF COUNTY
COMMISSIONERS
WELD COUNTY,
COLORADO

/s/ Gene R. Branther
Gene R. Branther,
Chairman

APPROVED AS TO FORM:

/s/ [Illegible]
County Attorney

/s/ George Kennedy
George Kennedy,
Pro-Tem

/s/ Constance L. Harbert
Constance L. Harbert

/s/ C.W. Kirby
C.W. Kirby

/s/ Gordon E. Lacy
Gordon E. Lacy

Read and Approved: October 31, 1990

Published in the New News: November 1, 1990

Effective Date: October 31, 1990

NORTH COLORADO MEDICAL CENTER
Greeley, Colorado

ANNUAL MEETING OF THE BOARD OF TRUSTEES

January 8, 1991

The Annual Meeting of the Board of Trustees was called to order at 4:12 p.m. in the Boardroom on Tuesday, January 8, 1991.

Attendance Report

Members present were Michael Frick, Julianne Haefeli, L. Kent Reitz, Kenneth Lind, Myra Monfort, Paul Hiratzka, M. D. and John Martin. Also present were Richard H. Stenner, Glenn Huston and Arlene Dirck.

Election of Officers for 1991

M.S.C. Haefeli, Frick to approve the nominations for the officers for 1991 as follows:

John T. Martin, President
L. Kent Reitz, Vice President
Paul Hiratzka, M. D., Secretary

Declarations of Conflicts of Interest or Possibilities thereof per Section 11 of Board of Trustees Bylaws

Michael Frick declared a possible conflict of interest due to this CPA firm representing several physician clients.

Kent Reitz declared his ownership of Kodak stock indicating Kodak furnishes supplies to NCMC.

Paul Hiratzka, M. D. declared his being a physician in private practice a possibility of a conflict of interest.

Meeting Time and Place for 1991

Monthly meetings of the Board of Trustees will be held on the 4th Monday, 12:00 noon, except May and December because of holidays. The meetings will be held in the Columbine Room unless notified otherwise. The dates of the 1991 meetings are as follows:

January 28	July 22
February 25	August 26
March 25	September 24
April 22	October 23
May 20	November 25
June 24	December 16

Old Business

There was no Old Business to be conducted.

New Business

Mr. Stenner notified the Board of Trustees that we are in receipt of the Resolution from the County Commissioners reappointing Paul Hiratzka, M. D. and John T. Martin to an additional three year term.

Adjourn

Having no further business the meeting was adjourned at 4:18 p.m.

/s/ Paul Hiratzka, M. D.
Paul Hiratzka, M. D.
Secretary

NORTH COLORADO MEDICAL CENTER
GREELEY, COLORADO

BOARD OF TRUSTEES

February 25, 1991

The Board of Trustees held its regular meeting at 12:00 noon on Monday, February 25, 1991, in the Columbine Room of North Colorado Medical Center.

John Martin, President, called the meeting to order at 12:22 p.m.

Attendance Report

Members in attendance were John Martin, President, Kent Reitz, Vice President, Paul Hiratzka, M. D., Secretary, Mike Frick, Ken Line and Julianne Haefeli, Myra Monfort was absent and excused. Also in attendance were Richard H. Steener, Glenn Huston and Arelen Dirck.

Approval of Minutes

M.S.C. to approve the minutes of the January 28, 1991 meeting as submitted.

Visitors for February

Mike Frick visited with Deb Gallentine, Manager of the Respiratory Therapy Department; and Paul Hiratzka, M. D. visited with Paul Reimer, Safety Officer, who is also in charge of Environmental Safety and Hazardous Waste.

Visitors for March

The visitor for March will be John Martin.

Hospital Report

Mr. Stenner reported an uncommitted balance of $720,270.20 in the Mill Levy Fund at the end of January, 1991.

New Business

Mike Breien reviewed the details of the bid results for the asbestos abatement in the 5 South mechanical room and the Service Floor mechanical room.

M.S.C. to award the bid to Millennium II in the amount of $30,000 plus a 10% contingency for the asbestos abatement.

M.S.C. to award the bid to Protech A&I in the amount of $10,296 plus a 10% contingency for the reinsulation of the abated areas.

Mike Breien also reviewed the bid list and specifications on the outside caulking project previously approved indicating that the only qualified contractors are located in the Denver area.

NORTH COLORADO MEDICAL CENTER
GREELEY, COLORADO
BOARD OF TRUSTEES

March 25, 1991

The Board of Trustees held its regular meeting at 12:00 noon on Monday, March 25, 1991, in the Columbine Room of North Colorado Medical Center.

John Martin, President, called the meeting to order at 12:20 p.m.

Attendance

Members in attendance were John Martin, Paul Hiratzka, M. D., Julianne Haefeli and Ken Lind. Myra Monfort, Mike Frick and Kent Reitz were absent and excused. Others present were Richard H. Stenner, Glenn Huston and Arlene Dirck. Mike Breien was present to address the Caulking and Asbestos Projects.

Visitor Reports

John Martin visited with Sandy Budde in Centennial Magnetic Imaging (MRI). Mr. Martin reviewed employee complement, service area, applications for use and explanation of the functions of magnetic imaging.

Visitors for April

Julianne Haefeli and Ken Lind will be the visitors for April

Hospital Report

Mr. Stenner advised he has placed a call to Don Warden to inquire regarding the status of moving the ambulance building to a difference [sic] location in order that NCMC may consider plans for use of the property. Mr. Warden was not available at the time of the call; therefore, Mr. Stenner has no update at this time.

The Patient Unit Project is reported to be on schedule with the exception for the drilling of the caissons due to the unstable layer of granite encountered in the drilling process.

New Business

There was no new business to bring up at this meeting.

Old Business

Mike Breien presented a report on the Caulking Project bids. Five contractors were invited to bid. Bids were received from Linco Waterproofing Corporation in the amount of $46,135, Restoration Specialists, Inc., in the amount of $36,600, and Western Water Proofing, in the amount of $74,225. Versar has been contacted and will request selected contractor to provide necessary performance bond and insurance.

M.S.C. to award the Caulking bid to Restoration Specialties, Inc. (RSI) in the [sic] for $36,600 and establish a $6,400 contingency fund.

Mr. Breien indicated the Asbestos Project is nearing completion. During the asbestos removal on the Fifth Floor, a

water line was broken and the contractor will contact his insurance carrier for any damage repairs.

Having no further business the meeting was adjourned at 12:38 p.m.

/s/ Paul Hiratzka MD
Paul Hiratzka, M. D.
Secretary

RESOLUTION OF THE BOARD OF TRUSTEES
FOR
NORTH COLORADO MEDICAL CENTER

WHEREAS, the Board of Trustees for North Colorado Medical Center (the "Hospital") is a body corporate duly organized, existing and created by Weld County, Colorado (the "County") pursuant to Title 25, Article 3, Part 3 of the Colorado Revised Statutes, as amended, with requisite corporate power to lease and operate hospital facilities and to carry on its business as presently being conducted; and

WHEREAS, in connection with the issuance by the Colorado Health Facilities Authority (the "Authority") of its Hospital Refunding Revenue Bonds (North Colorado Medical Center Project) Series 1985 (the "Series 1985 Bonds"), the Hospital has previously entered into a Lease, dated as a December 1, 1985 (the "Original Lease"), with the Authority and accepted and approved by the County leasing those certain hospital facilities in the City of Greeley, Colorado, known as the North Colorado Medical Center (the "Hospital Facilities") currently being operated by North Colorado Medical Center, Inc. a nonprofit corporation duly organized and existing under the laws of the State of Colorado (the "Corporation") pursuant to an Amended and Restated Operating Sublease (the "Original Sublease"); and

WHEREAS, the Hospital Facilities are situated on land currently owned by the County and leased to the Authority pursuant to a Ground Lease, dated as of December 1, 1990 (the "Original Ground Lease"); and

WHEREAS, the Original Lease, the Original Sublease and the Original Ground Lease were amended and supplemented by and Agreement, dated April 29, 1988, among the Authority, the Hospital, the Corporation, the County and the hereinafter defined Trustee to exchange certain parcels of land; and

WHEREAS, the Hospital and the Corporation propose to renovate, replace and construct certain additions to the Hospital Facilities, receive reimbursement for certain capital expenditures previously made by the Hospital and the corporation in connection with the Hospital Facilities, to fund future capital expenditures for the Hospital Facilities, to provide working capital for the Hospital Facilities and to pay certain cost associated therewith (collectively, the "Project"); and

WHEREAS, the Trust Indenture, dated as of December 1, 1985 (the "Original Indenture"), between the Authority and United Bank of Denver National Association, as successor in trust to IntraWest Bank of Greeley, N.A. (the "Trustee") executed in connection with the issuance of the Series 1985 Bonds provides that, upon the Hospital meeting certain conditions contained therein, the Authority may issue additional bonds to fund expenditures made in connection with the Hospital Facilities, such as the Project; and

WHEREAS, the Hospital has complied with the necessary requirements contained in the Original Indenture with respect to the issuance of additional bonds; and

WHEREAS, the Authority has agreed to issue its Variable Rate Demand Hospital Bonds (North Colorado Medical Center) Series 1990 (the "Series 1990 Bonds")

pursuant to a First Supplemental Trust Indenture, dated as of November 1, 1990 (the "First Supplemental Indenture"), between the Authority and the Trustee, amending and supplementing the Original Indenture, in the aggregate principal amount of $42,800,000 and to use the proceeds thereof to fund the Project; and

WHEREAS, the Hospital will enter into a First Supplemental Lease, dated as of November 1, 1990 (the "First Supplemental Lease"), between the Authority and the Hospital and accepted and approved by and the County, amending and supplementing the Original Lease and providing for the payment of the Series 1990 Bonds through additional lease payments to be made by the Hospital;

WHEREAS, the Hospital and the Corporation shall enter into a Second Amended and Restated Operating Sublease, dated as of November 1, 1990 (the "Second Amended and Restated Sublease"), amending, supplementing and restating the Original Sublease, pursuant to which the Corporation covenants to perform the obligations of the Hospital under the Original Lease, as amended by the First Supplemental Lease and the hereinafter defined Second Supplemental Lease; and

WHEREAS, certain additions to the Hospital Facilities included in the Project shall be constructed on land currently owned by the County and not included in the Original Ground Lease; and

WHEREAS, the County has agreed to lease such additional land to the Authority pursuant to a First Supplemental Ground Lease, dated as of November 1, 1990

(the "First Supplemental Ground Lease"), amending and supplementing the Original Ground Lease; and

WHEREAS, the execution and delivery of the First Supplemental Ground Lease requires the consent of the Hospital, the Corporation and the Trustee; and

* * *

BEST AVAILABLE COPY

FINAL REPORT

PROJECTS FUNDED BY THE MILL LEVY FUNDS AND APPROVED BY THE BOARD OF TRUSTEES

PROJECT	APPROVED BUDGET		FINAL PROJECT COST		
	Date	Amount	Date	Amount	Over/Under
Parking Lot Remodel	12/18/90	326,455	4/23/90	327,682	+$ 1,227
Health Services Building	12/18/90	148,606	4/23/90	153,402	+$ 4,796
Automatic Doors (Main Lobby)	7/24/89	14,000	4/23/90	14,357	+$ 357
Family Recovery Center	12/18/89	269,480	4/23/90	269,480	—
4-East Asbestos Removal	12/18/89	145,480	4/23/90	144,617	-$ 863
New Addition-Linear Accelerator	5/22/89	405,000	4/23/90	363,701	-$41,299
5-East Remodeling	10/23/89	28,566	4/23/90	29,311	+$ 745
Basement (Asbestos Removal)	2/26/90	81,144	4/23/90	75,480(Est.)	-$ 5,664
		1,418.731		1,378.030	

MB/dc
4/23/90

NORTH COLORADO MEDICAL CENTER
Greeley, Colorado

MEMO TO: NCMC Board of Directors

FROM: Desiree' Conner

DATE: December 23, 1991

SUBJECT: AMENDMENT TO BYLAWS

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Enclosed please find the amendment to the Board Bylaws which was approved by the Board at the December 16, 1991 meeting. The approved amendment changes the composition of the Board of Directors from consisting of 7 county hospital trustees to 4 county hospital trustees selected by the Board of Directors of NCMC, Inc.

Please replace the Table of Contents with the attached Table of Contents, replace page 3 of your Bylaws with the attached page 3 and file the "Amendment" (page 28) as the last page of your Bylaws.

Also enclosed please find a copy of a document prepared by Dr. Hiratzka and Dr. O'Neal concerning anesthesia services at NCMC.

If you have any questions, please don't hesitate to contact me.

MERRY CHRISTMAS!

NORTH COLORADO MEDICAL CENTER
Greeley, Colorado

BOARD OF DIRECTORS
MEMBERS – 1992

Paul S. Hiratzka, M.D. 1994
2410 16th Street
Greeley, Colo. 80631
352-6353 . . . or Ext. 1677

John T. Martin 1994
147 South Denver Avenue
Ft. Lupton, Colo. 80621
857-4800 or 857-2471

June Steinmark 1994
1700 Springmeadow Ct. Unit C
Ft. Collins, Colo. 80525
493-7952

Richard H. Stenner 1994
1801 16th Street
Greeley, Colo. 80631
350-6000

David Kremser, Chair 1993
2010 46th Avenue – B1
Greeley, Colo. 80634
330-7311

Julianne Haefeli, Vice Chair 1993
2008 18th Avenue
Greeley, Colo. 80631
353-2008

Myra Monfort 1995
1357 43rd Avenue, #29
Greeley, Colo. 80634
352-8899

Elly Natividad 1993
1001 43rd Avenue, #9
Greeley, CO 80634
686-4343 – Kodak #

William Mangum, M.D. 1993
2020 16th Street
Greeley, Colo. 80631
352-8216

Mel Ylarraz 1993
511 Palisade Mountain Drive
Windsor, Colo. 80550
686-9651

James R. Smith 1995
2650 1st Avenue
Greeley, Colo. 80631
352-9184

Kenneth Lind 1995
1011 11th Avenue
Greeley, Colo. 80631
353-2323

Michael J. Frick 1995
3690 W. 10th Street
Greeley, Colo. 80634
356-3300

NORTH COLORADO MEDICAL CENTER, INC.
Greeley, Colorado

ANNUAL MEETING OF THE BOARD OF TRUSTEES

January 14, 1992

The Annual Meeting of the Board of Trustees was called to order at 4:10 p.m. in the President's Office on Tuesday, January 14, 1992.

ATTENDANCE REPORT

Members present were John T. Martin, President, L. Kent Reitz, Vice President, Paul S. Hiratzka, M.D., Julianne Haefeli, Michael J. Frick, Dennis Hoshiko and Donald Mueller. Also present were Gordon Lacy, Richard H. Stenner, Glenn Huston and K'Anne Vogel.

ELECTION OF OFFICERS FOR 1992

MSC to retain the same slate of officers for 1992; therefore, John T. Martin will remain as President with L. Kent Reitz as Vice President and Dr. Paul S. Hiratzka as Secretary for 1992.

DECLARATIONS OF CONFLICTS OF INTEREST

According to Section 11 of the Board of Trustees Bylaws, members will annually declare conflicts of Interest.

Michael Frick declared a possible conflict of interest due to his CPA firm representing several physician clients.

Kent Reitz declared his ownership of Kodak stock and their relationship with NCMC as a supplier.

Dr. Paul Hiratzka declared his ownership of Union Colony Bank stock as well as his partnership in the Women's Clinic of Greeley.

MEETING TIMES AND PLACES FOR 1992

Monthly meetings will be held on the 4th Monday, 12:00 noon, except May and December because of holidays. The meeting dates are as follows:

January 27, 1992
February 24, 1992
March 23, 1992
April 27, 1992
May 18, 1992
June 22, 1992
July 27, 1992
August 24, 1992
September 28, 1992
October 26, 1992
November 23, 1992
December 21, 1992

NEW BUSINESS

Mr. Stenner distributed copies of Resolutions for Myra Monfort and Kenneth Lind honoring their dedicated service over the course of their three year term with the Board of Trustees. MSC to approve the Resolutions as drafted.

Mr. Stenner introduced the new members to the Board of Trustees as appointed by the Commissioners. Dennis Hoshiko and Donald Mueller have been appointed for three year terms on the Board to expire January 11, 1995.

Having no further business, the meeting was adjourned at 4:20 p.m.

/s/ Paul Hiratzka
Paul S. Hiratzka, M.D.,
Secretary

THIRD AMENDED AND RESTATED
OPERATING SUBLEASE

Between

BOARD OF TRUSTEES FOR
NORTH COLORADO MEDICAL CENTER.
as Sublessor

And

NORTH COLORADO MEDICAL CENTER, INC.,
as Sublessee

Dated as of January 15, 1993

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* * *

THIRD AMENDED AND RESTATED
OPERATING SUBLEASE

This Third Amended and Restated Operating Sublease, dated as of January 15, 1993 (this "Sublease"), by and between the BOARD OF TRUSTEES FOR NORTH COLORADO MEDICAL CENTER, a body corporate, created and appointed by the Board of County Commissioners of Weld County pursuant to authority vested in Weld County by Part 3 of Article 3 of Title 25 of the Colorado Revised Statutes, as amended (the "Sublessor"), and NORTH COLORADO MEDICAL CENTER, INC., a Colorado nonprofit corporation (the "Sublessee"), is intended by the parties hereto to amend and restate the Operating Sublease between the Sublessor and Sublessee, dated the 8th day of March, 1985, as amended, supplemented and restated by an Amended and Restated Operating Sublease between the Sublessor and the Sublessee, as further amended and supplemented by the Agreement dated

April 27, 1988 (the "Ageement"), among the Sublessee, the Sublessor and the hereinafter defined Authority, County and Trustee and as further amended, supplemented and amended by a Second Amended and Restated Operating Sublease, dated as of November 1, 1990, between the Sublessor and the Sublessee (collectively, the "Original Sublease").

WHEREAS, the Colorado Health Facilities authority (the "Authority") is a body politic and corporate of the State of Colorado created under the Colorado Health Facilities Authority Act, Article 25 of Title 25, Colorado Revised Statutes (the "Act"); and

WHEREAS, the Authority is authorized under the Act, among other things, to issue bonds to construct, improve, equip or acquire hospitals and health care facilities; and

WHEREAS, the Authority has previously issued its Hospital Refunding Revenue Bonds (North Colorado Medical Center Project) Series 1985 (the "Series 1985 Bonds") in the aggregate principal amount of $15,900,000 and its Variable Rate Demand Hospital Bonds (North Colorado Medical Center) Series 1990 (the "Series 1990 Bonds") in the aggregate principal amount of $62,960,000 pursuant to a Trust Indenture, dated as of December 1, 1985, between the Authority and Norwest Bank Denver, N.A., successor in trust to United Bank of Denver National Association and IntraWest Bank of Greeley, N.A., as Trustee (the "Trustee"), as amended and supplemented by a First Supplemental Trust Indenture, dated as of November 1, 1990, between the authority and the Trustee and a Second Supplemental Trust Indenture,

dated as of November 1, 1990, between the Authority and the Trustee (collectively, the "Original Indenture"); and

WHEREAS, Weld County, Colorado (the "County") has previously leased certain land and hospital facilities located thereon to the Authority pursuant to a Ground Lease, dated as of December 1, 1985, between the County and the Authority as amended and supplemented by the Agreement and the First Supplemental Ground lease, dated as of November 1, 1990, between the County and the Authority (collectively, the "Ground Lease"); and

WHEREAS, in connection with the Series 1985 Bonds and the Series 1990 Bonds, the Sublessor and the Sublessee previously entered into the Original Sublease; and

WHEREAS, the Original Indenture provides that the Authority may issue Additional Bonds (as defined in the Original Indenture) to refund any series of outstanding Bonds in accordance with the Original Indenture, to finance any improvements constituting "health care facilities" within the meaning of the Act to the Hospital Facilities and located on the Land, each as defined in the Original Indenture, as amended, and to obtain funds for any other purposes permitted under the Act upon complying with certain provisions of the Original Indenture; and

WHEREAS, The Authority has determined that in order to crossover refund the Series 1990 Bonds, to replace and renovate portions of the Hospital Facilities, to fund a reserve fund and to pay costs of issuance, the Authority will issue its Hospital Revenue Bonds (North Colorado Medical Center) Series 1993 in the aggregate

principal amount of $63,875,000 (the "Series 1993 Bonds"); and

WHEREAS, the Authority and the Trustee have entered into a Third Supplemental Trust Indenture, dated as of January 15, 1993 (the "Third Supplemental Indenture"), amending and supplementing the Original Indenture, to provide for the issurance of the Series 1993 Bonds (the Original Indenture, the Third Supplemental Indenture and any amendments or supplements thereto are collectively referred to herein as the "Indenture"); and

WHEREAS the Authority and the Sublessor, with the approval of Weld County, Colorado (the "County") have heretofore entered into a Lease, dated as of December 1, 1985, as amended and supplemented by the Agreement and the First Supplemental Lease, dated as of November 1, 1990, the Second Supplemental Lease, dated as of November 1, 1990, and the Third Supplemental Lease, dated as of January 15, 1993, each between the Authority and the Sublessor, as accepted and approved by the County (collectively, the "Lease") leasing the Land and the Hospital Facilities to the Sublessor; and

WHEREAS, the Sublessor and the Sublessee desire to supplement, amend and restate the Original Sublease by this Third Amended and Restated Sublease to provide for additional payments and covenants to secure the Series 1993 Bonds being issued as Additional Bonds (the Series 1985 Bonds, the Series 1990 Bonds, the Series 1993 Bonds and any Additional Bonds are collectively referred to herein as the "Bonds"); and

WHEREAS, the Corporation has guaranteed the payment of the principal of, previous if any, and interest on

the Series 1985 Bonds, the Series 1990 Bonds, the Series 1993 Bonds and any Additional Bonds pursuant to the terms and conditions of a Guaranty Agreement, dated as of January 15, 1993 (the Guaranty Agreement), between the Corporation and the Trustee.

NOW, THEREFORE, THIS THIRD RESTATED AND AMENDED SUBLEASE, WITNESSETH:

ARTICLE I

DEFINITIONS

All capitalized terms used in this Sublease and not defined herein shall have the meanings assigned to them in the Indenture, including without limitation the Third Supplemental Indenture. In addition, the following terms shall have the following meanings herein.

"Gross Receipts" shall mean all receipts, revenues, income and other moneys (except as hereinafter provided) received by or on behalf of the Sublessee from the operations of the Sublessee's Facilities, excluding gifts, grants, bequests, donations and contributions to the Sublessee designated for a specific purpose inconsistent with the payment of the Bonds.

"Sublease" shall mean this Third Amended and Restated Operating Sublease.

"Sublease Commencement Date" shall mean the date of original execution and delivery of this Sublease.

"Sublessee" shall mean North Colorado Medical Center, Inc., a Colorado nonprofit corporation.

"Sublessee's Facilities" shall mean the health care building and structures, including the Hospital Facilities, owned or leased and operated by the Sublessee.

* * *

issuing the same or with other evidence of payment of the premiums satisfactory to the Sublessor and the Authority.

Section 5.10. *Installation of Equipment by the Sublessee.* The Sublessee may from time to time in its sole discretion and at its own cost and expense, install or place other equipment and tangible personal property in the Sublessee's Facilities so that the Sublessee's Facilities may be operated in a safe, and efficient manner. The Sublessee may remove such equipment and tangible personal property at any time at its own cost and expense, whether or not the same shall have been affixed or annexed to the Sublessee's Facilities, but any damage caused to the Sublessee's Facilities by any such removal shall be restored at the sole cost and expense of the Sublessee.

Section 5.11. *Sublessor's Right to Perform Sublessee's Covenants: Advances.* In the event the Sublessee shall fail to (i) pay any tax, charge, assessment or imposition pursuant to Section 5.05 hereof, (ii) remove any lien, encumbrance, or charge pursuant to Section 5.03 hereof, (iii) maintain the Sublessee's Facilities in repair pursuant to Section 6.01 hereof, (iv) procure the insurance required by Article IX hereof, or (v) fail to make any other payment (other than rent as required in Article VIII) or perform any other act required to be performed hereunder, then and in each such case the Sublessor, the Authority or the Trustee may (but shall not be obligated

to) remedy such event of default for the account of the Sublessee and make advances for that purpose. No such performance or advance shall operate to release the Sublessee from any such default and any sums so advanced by the Sublessor, the Authority, or the Trustee, on demand and shall bear interest at the prime rate of the Trustee per annum from the date of the advance until repaid. The Sublessor, the Authority, or the Trustee shall have the right of entry on the Sublessee's Facilities or any portion thereof in order to effectuate the purposes of this Section.

Section 5.12. *Rates, Charges, and Community Care.* The Sublessee covenants and agrees to operate the Hospital Facilities as a revenue producing "health facility" as defined in the Act on a non-discriminatory basis, to charge fees and rates for its facilities and services, to exercise such skill and diligence as to provide revenues from the operation of the Sublessee's Facilities, including without limitation, the Hospital Facilities sufficient to pay promptly the expenses of operation, maintenance and repair of the Sublessee's Facilities including without limitation, the Hospital Facilities assumed by Sublessee under the terms of this Sublease and all rent due and to provide all payments required to be made by Sublessee under this Sublease, and, to the extent of its financial ability to do so, provide health care services to the residents of Weld County, regardless of their ability to pay for such services. The Sublessee further covenants and agrees that it will, so long as the Bonds are outstanding, from time to time as often as necessary revise the rates, fees and charges in such manner as may be necessary or proper to comply with the provisions of this section and

with the provisions of section 6.11 of the Lease. Nothing in this section shall be construed to prohibit the Sublessee, in its sole discretion, from furnishing a community service and providing, without charge or at reduced rates, a reasonable volume of services to persons unable to pay therefor.

The parties hereto recognize that (a) the method or methods by which hospitals are paid for services may continue to change from time to time while this Sublease is in effect (e.g., third-party reimbursements or payments, required or accepted methods for structuring fees, rentals, rates and other charges, private and governmental insurance programs, federal and state regulatory laws and regulations) and (b) other developments not now foreseeable may occur and substantially affect the financing and delivery of health care services. A Hospital Consultant may be retained by the Sublessee pursuant to this section and may recommend (with respect to the fees, rentals, rates or other charges in the operations of or the services rendered by the Sublessee) that either (a) the Sublessee make no change, or (b) make some change even though such recommendation may only be made if the Hospital Consultant includes in his written report and recommend a statement that, in his opinion, compliance with such recommendations will result in compliance with the provisions of Section 6.11 of the Lease to the maximum extent feasible. The Sublessee will not be deemed in default under this section if the Sublessee follows the recommendations of the Hospital Consultant and the payments made by the Sublessee under this Sublease are greater than 100% of the debt service on the Bonds.

Section 5.13. *Financial Statements, Etc.* The Sublessee will keep proper books of record and account in which full, true and correct entries will be made of all dealings or transactions of or in relation to the business and affairs of the Sublessee, in accordance with generally accepted principals [sic] of accounting consistently applied, and will furnish to the Sublessor, the Authority, the Bond Insurer and the Trustee:

* * *

accepted accounting principles) except for those items permitted in the Lease and then only with the written consent of the Sublessee.

ARTICLE VII

TERM

This Sublease commenced on the Sublease Commencement Date and shall continue until all the Bonds and any amounts due under the Indenture are paid in full or when provisions to pay the Bonds have been made as provided in the Indenture, subject to Section 12.03 hereof. Notwithstanding the foregoing, the County, the Hospital, the Authority, the Corporation and the Trustee have entered into a Memorandum of Understanding, dated as of February 1, 1993 (the "Memorandum of Understanding"), pursuant to which, and subject to certain conditions contained therein, the County, the Hospital, the Authority, the Corporation and the Trustee may reorganize their present relationships to provide that the Corporation, pursuant to a loan agreement (which loan agreement shall have substantially the same covenants, terms and provisions as this Sublease) with the Authority,

will become the ultimate borrower for purposes of paying the Bonds, as more fully set forth in the Memorandum of Understanding. Upon such reorganization, this Sublease may be cancelled and replaced with a lease agreement between the Corporation and the County or the Hospital.

ARTICLE VIII

RENT

Sublessee agrees to and shall pay Sublessor, its successors or its designees, rent for the Hospital Facilities during the term of this Sublease in such amounts as are equal to the rental payments or Sublessor under the Lease or any successor agreement thereto, such rent being due and payable upon execution of this Sublease as provided in said Lease. All payments of rent under this Sublease shall be made by the Sublessee directly to the persons as provided for in the Lease.

ARTICLE IX

INSURANCE

Section 9.01. *Liability, Casualty and Other Insurance.* The Sublessee shall maintain, or cause to be maintained, except as hereinafter provided, the following insurance for the Sublessee and Sublessee's Facilities:

* * *

(or other similar official) of the Sublessee or for any substantial part of its property, or ordering the winding-up or liquidation of its affairs and the continuance of any such decree or order

unstayed and in effect for a period of 60 consecutive days; or

(h) The commencement by the Sublessee of a voluntary case under the federal bankruptcy laws, as now or hereafter constituted, or any other applicable federal or state bankruptcy, insolvency or other similar law, or the consent by it to the appointment of or taking possession by a receiver, liquidator, assignee, trustee, custodian, sequestrator (or other similar official) of the Sublessee or for any substantial part of its property, or the making by it of any assignment for the benefit of creditors, or the failure of the Sublessee generally to pay its debts as such debts become due, or the taking of corporate action by the Sublessee in furtherance of any of the foregoing;

(i) If the Sublessee abandons any of the Sublessee's Facilities for a period of thirty (30) consecutive days; or

(j) An Event of Default Under the Lease.

Section 13.02. *Remedies on Default.* If any event of default shall occur and be continuing, the Sublessor may at its option exercise any one or more of the following remedies:

(a) The Sublessor may terminate this Sublease by giving to the Sublessee written notice of the Sublessor's intention so to do, in which event the term of this Sublease shall end, and all right, title and interest of the Sublessee hereunder shall expire, on the date stated in such notice, which shall not be less than ten (10) days after the date of the notice by the Sublessor of its intention so to terminate;

(b) The Sublessor may terminate the right of the Sublessee to possession of the Hospital Facilities or any portion thereof by giving written notice to the Sublessee that the Sublessee's right of possession shall end on the date stated in such notice, which shall not be less than ten (10) days after the date of the notice by the Sublessor of its intention so to terminate;

(c) The Sublessor may enforce the provisions of this Sublease and may enforce and protect the right of the Sublessor hereunder by a suit or suits in equity or at law for the specific performance of any covenant or agreement contained herein or for the enforcement of any other appropriate legal or equitable remedy;

(d) The Sublessor may accelerate and declare all future rents hereunder to be immediately due and payable;

(e) The Sublessor may require the Sublessee, after the payment of all debts and liabilities then outstanding, to reconvey all assets then held by Sublessee under the terms of this Sublease to Sublessor; or

(f) The Sublessor may, upon written notice to the Sublessee, revoke or rescind any and all rights and options of the Sublessee hereunder.

The Authority or the Bond Trustee, as assignees of the Sublessor, may exercise any remedy granted the Sublessor hereunder; provided, however, that no remedy described above may be executed by the Sublessor without the prior written consent of the Authority and the Bond Insurer.

Section 13.03. *Right of Re-Entry.* If the Sublessor exercises either of the remedies provided for in subparagraph (a) or (b) of Section 13.02, the Sublessor may then or at any time thereafter re-enter and take complete and peaceful possession of the Hospital Facilities or any portion thereof, with or without process of law, and may remove all persons therefrom, and the Sublessee covenants in any such event peacefully and quietly to yield up and surrender the Hospital Facilities and any portion thereof to the Sublessor.

Section 13.04. *Right to Sublet or Re-Let.* If the Sublessor terminates the Sublessee's right of possession, the Sublessor may re-enter the Hospital Facilities or any portion thereof and take possession of all or any portion thereof (including any and all equipment and apparatus thereon), may remove any portion of the equipment, machinery or apparatus thereon which the Sublessee elects so to do, and sublet, assign or re-let the Hospital Facilities or any part thereof from time to time for all or any part of the unexpired part of the term of this Sublease, or for a longer period, and the Sublessor may collect the rents from such re-letting or subletting and apply the same, first, to the payment of the expense of reentry and re-letting, and secondly, to the payment of the rents payable hereunder.

* * *

Section 13.09. *Agreement to Pay Attorneys' Fees and Expenses.* In the event the Sublessee should default under any of the provisions of this Sublease and the Sublessor, the Authority or the Trustee should employ attorneys or incur other expenses for the collection of rent or the

enforcement of performance or observance of any obligation or agreement on the part of the Sublessee herein contained, the Sublessee agrees that it will on demand therefor pay to such party the reasonable fees of such attorneys and such other expenses so incurred by the Sublessor, the Authority or the Trustee.

ARTICLE XIV
NO WAIVER

Section 14.01. *Time Is of the Essence.* Time is of the essence, and both parties agree to perform their obligations in a timely manner.

Section 14.02. *Delay.* No delay or failure on the part of either party in exercising or enforcing any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right, power or privilege.

Section 14.03. *No Oral Waiver.* No act done or thing said by either party or its agents or employees shall constitute a cancellation, termination or modification of this Sublease, or a waiver of any covenant, agreement or condition hereof, nor relieve either party from its obligation to pay the Rent reserved or other charges to be paid hereunder. Any waiver or release by either party and any cancellation, termination or modification of this Sublease, must be in writing signed by both parties.

Section 14.04. *No Additional Waiver Implied by One Waiver.* In the event the breach of any agreement contained in this Sublease should be waived by either party, such waiver shall be limited to the particular breach so

waived and shall not be deemed to waive any other breach hereunder.

Section 14.05. *Waiver of Stay or Extension Laws.* The Sublessee covenants (to the extent that it may lawfully do so) that they will not at any time insist upon, or plead, or in any manner whatsoever claim or take the benefit or advantage of, any stay or extension law wherever enacted, now or at any time hereafter in force, which may affect the covenants or the performance of this Sublease, the Lease or the Indenture; and the Sublessee hereby expressly waives all benefit or advantage of any such law, and covenants that it

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FOURTH SUPPLEMENTAL LEASE

Between

COLORADO HEALTH FACILITIES AUTHORITY,
as Lessor

and

BOARD OF TRUSTEES FOR
NORTH COLORADO MEDICAL CENTER,
as Lessee

Dated as of December 1, 1994

* * *

Sublessee will not, except as permitted in Section 12.02 hereof, create or permit to be created or remain and will, at its cost and expense, promptly discharge all liens, encumbrances and charges on revenues from the Hospital Facilities or any part thereof other than the Indenture itself and the Permitted Encumbrances as defined in Article I of the Indenture.

Section 5.04. Compliance with Orders, Ordinances, Etc. Subject to the provisions of Section 5.06 hereof relating to permitted contests, the Sublessee will, at its sole cost and expense, promptly comply with all present and future laws, ordinances, orders, decrees, rules, regulations and requirements of every duly constituted governmental authority, commission and court and the officers thereof which may be applicable, taking into account all exceptions and grandfathering provisions, to the Sublessee or to the Sublessee's obligations under the terms of

this Sublease regarding the Sublessee's Facilities or any part thereof or any of the streets, alleys, passageways, sidewalks, curbs, gutters, vaults and vault spaces adjoining the Sublessee's Facilities or any part thereof or to the use or manner of use, occupancy or condition of the Sublessee's Facilities or any part thereof.

Section 5.05. Taxes, Charges and Assessments. The Sublessee covenants and agrees, subject to the provisions of Section 5.06 hereof relating to permitted contests, to pay, or cause to be paid, out of Gross Receipts:

(a) all taxes and charges on account of the use, occupancy or operation of the Sublessee's Facilities, including but not limited to all sales, use, occupation, real and personal property taxes, if any, all permit and inspection fees, occupation and license fees and all water, gas, electric light, power or other utility charges assessed or charged on or against the Sublessee's Facilities or on account of the use or occupancy thereof or the activities conducted thereon or therein; and

(b) all taxes, assessments and impositions, general and special, ordinary and extraordinary, of every name and kind, which shall be taxed, levied, imposed or assessed during the term of this Sublease upon all or any part of the Sublessee's Facilities, or the interest of the Sublessor, the Authority and of the County or any of them in and to the Sublessee's Facilities, or upon the Sublessor's and the Sublessee's interest, or the interest of either of them in this Sublease or the rentals payable hereunder.

* * *

Hospital Facilities, by the Sublessee during the term hereof, in accordance with or as required by any provisions of this Sublease, the Sublessee agrees that:

(a) no work in connection therewith shall be undertaken until the Sublessee shall have procured and paid for, so far as the same may be required, from time to time, all municipal and other governmental permits and authorizations of the various municipal departments and governmental subdivisions having jurisdiction, and the Sublessor agrees to join in the application for such permits or authorizations whenever such action is necessary;

(b) all work in connection therewith shall be done promptly and in good workmanlike manner and in compliance with the building and zoning laws of the municipality or other governmental subdivision wherein the Sublessee's Facilities are situated, and with all laws, ordinances, orders, rules, regulations and requirements of all federal, state and municipal governments and the appropriate departments, commissions, boards and officers thereof, and shall not violate the provisions of any policy of insurance covering the Sublessee's Facilities, and the work shall be prosecuted with reasonable dispatch, unavoidable delays excepted; and

(c) worker's compensation insurance covering all persons employed in connection with the work and with respect to whom death or bodily injury claims could be asserted against the Authority, the County, the Sublessor, the Sublessee or the Sublessee's Facilities, and general liability insurance (specifically covering this class of risk) for the mutual benefit of the Sublessor, the Authority and the Sublessee in such amounts as is customarily carried by like organizations engaged in like activities of comparable size and liability exposure and as otherwise required or

permitted by applicable law. The general liability insurance provided for in this paragraph may be effect [sic] by an appropriate endorsement, if obtainable, upon the insurance referred to in Article IX hereof. All such insurance shall be effected with financially sound and reputable insurance companies qualified to do business in the State, and upon the Sublessor's or the Authority's written request, the Sublessee shall deliver to the Sublessor or the Authority all policies or certificates therefor issued by the respective insurers endorsed "Premium Paid" by the company or agencies issuing the same or with other evidence of payment of the premiums satisfactory to the Sublessor and the Authority.

Section 5.10. Installation of Equipment by the Sublessee. The Sublessee may from time to time in its sole discretion and at its own cost and expense, install or place other equipment and tangible personal property in the Sublessee's Facilities so that the Sublessee's Facilities may be operated in a safe, and efficient manner. The sublessee may remove such equipment and tangible personal property at any time at its own cost and expense, whether or not the same shall have been affixed or annexed to the Sublessee's Facilities, but any damage cause to the Sublessee's Facilities by any such removal shall be restored at the sole cost and expense of the Sublessee.

Section 5.11. Sublessor's Right to Perform Sublessee's Covenants; Advances. In the event the Sublessee shall fail to (i) pay any tax, charge, assessment or imposition pursuant to Section 5.05 hereof, (ii) remove any lien, encumbrance, or charge pursuant to Section 5.03 hereof, (iii) maintain the Sublessee's Facilities in repair pursuant

to Section 6.01 hereof, (iv) procure the insurance required by Article IX hereof, or (v) fail to make any other payment (other than rent as required in Article VIII) or perform any other act required to be performed hereunder, then and in each such case the Sublessor, the Authority or the Trustee may (but shall not be obligated to) remedy such event of default for the account of the Sublessee and make advances for that purpose. No such performance or advance shall operate to release the Sublessee from any such default and any sums so advanced by the Sublessor, the Authority, or the Trustee, on demand and shall bear interest at the prime rate of the Trustee per annum from the date of the advance until repaid. The Sublessor, the Authority, or the Trustee shall have the right of entry on the Sublessee's Facilities or any portion thereof in order to effectuate the purposes of this Section.

Section 5.12. Rates, Charges, and Community Care. The Sublessee covenants and agrees to operate the Hospital Facilities as a revenue producing "health facility" as defined in the Act on a non-discriminatory basis, to charge fees and rates for its facilities and services, to exercise such skill and diligence as to provide revenues from the operation of the Sublessee's Facilities, including without limitation, the Hospital Facilities sufficient to pay promptly the expenses of operation, maintenance and repair of the Sublessee's Facilities including without limitation, the Hospital Facilities assumed by Sublessee under the terms of this Sublease and all rent due and to provide all payments required to be made by Sublessee under this Sublease, and, to the extent of its financial

ability to do so, provide health care services to the residents of Weld County, regardless of their ability to pay for such services. The Sublessee further covenants and agrees that it will, so long as the Bonds are outstanding, from time to time as often as necessary revise the rates, fees and charges in such manner as may be necessary or proper to comply with the provisions of this section and with the provisions of Section 6.11 of the Lease. Nothing in this section shall be construed to prohibit the Sublessee, in its sole discretion, from furnishing a community service and providing, without charge or at reduced rates, a reasonable volume of services to persons unable to pay therefor.

The parties hereto recognize that (a) the method or methods by which hospitals are paid for services may continue to change from time to time while this Sublease is in effect (e.g., third-party reimbursements or payments, required or accepted methods for structuring fees, rentals, rates and other charges, private and governmental insurance programs, federal and state regulatory laws and regulations) and (b) other developments not now foreseeable may occur and substantially affect the financing and delivery of health care services. A Hospital Consultant may be retained by the Sublessee pursuant to this section and may recommend (with respect to the fees, rentals, rates or other charges in the operations of or the services rendered by the Sublessee) that either (a) the Sublessee make no change, or (b) make some change even though such recommendation may only be made if the Hospital Consultant includes in his written report and recommends a statement that, in his opinion, compliance with such recommendations will result in compliance

with the provisions of Section 6.11 of the Lease to the maximum extent feasible. The Sublessee will not be deemed in default under this section if the Sublessee follows the recommendations of the Hospital Consultant and the payments made by the Sublessee under this Sublease are greater than 100% of the debt service on the Bonds.

Section 5.13. Financial Statements, Etc. The Sublessee will keep proper books of record and account in which full, true and correct entries will be made of all dealings or transactions of or in relation to the business and affairs of the Sublessee, in accordance with generally accepted principals [sic] of accounting consistently applied, and will furnish to the Sublessor, the Authority, the Bond Insurer and the Trustee:

* * *

preceding three years, in which case the Guaranty will be valued at 100% of the principal amount of debt guaranteed.

(d) liabilities (other than for borrowed money and other than rents payable under capitalized lease agreements) incurred in the regular operation of the Sublessee;

(e) liabilities, other than those described above, to banks or other institutional investors or money debt, unsecured or secured by or evidenced by mortgages, capitalized leases for equipment (other than this Lease), liens, security agreements or conditional sales contracts; provided that no such mortgage of or such security interest in the Hospital Facilities shall be permitted; provided further that the amount of liabilities described in this

clause (e), together with outstanding Funded Debt, shall not in the aggregate at any one time exceed 18% of the Net Operating Revenues of the Sublessee for the preceding fiscal year;

(f) working capital loans maturing in one year or less from their original terms in an aggregate amount at any one time outstanding not exceeding one-twelfth of its Net Operating Revenues for the preceding fiscal year, provided that there shall be no indebtedness outstanding under this subparagraph (f) for a period of at least 30 days in each fiscal year;

(g) unsecured indebtedness of the Sublessee to make interest or other payments under nonassignable agreements during the lifetime of a person who has made a gift to the Sublessee but has reserved a lifetime or lesser interest in such gift and who required such payment as a condition of such gift;

(h) Completion Indebtedness in a principal amount not exceeding ten percent (10%) of the aggregate original face amount of the Funded Debt issued to finance the project or other improvements to the Hospital Facilities for which Completion Indebtedness has been issued;

(i) borrowings from the Depreciation Reserve Fund as permitted in Section 5.18 hereof;

(j) any borrowing from a donor-restricted fund; and

(k) Commitment Indebtedness without limit.

* * *

(c) shall be exempt from federal income taxation under Section 501(a) and Section 501(c)(3) of the Code;

(d) shall provide the Trustee with an opinion of nationally recognized municipal bond counsel to the effect that such disposition, lease, transfer, conveyance, consolidation or merger will not adversely affect the validity of any of the Bonds or the exemption from federal income taxation of interest on the Bonds;

(e) shall be qualified to file an application for Hill-Burton funds or is approved as a transferee by a state agency designated in accordance with Section 291(d) of Title 42 of the United States Code Annotated as then amended, if Hill-Burton funds have been received by the Sublessee prior to such disposition, consolidation or merger, unless any right of recovery the United States Government may have against the Sublessee as a result of such disposition, consolidation or merger, in the opinion of counsel to the Sublessee, cannot reasonably result in a substantial adverse judgment;

(f) shall assume in writing all of the obligations of the Sublessee herein;

(g) shall provide the Trustee with an opinion of counsel, Certificate of an Accountant or a Hospital Consultant to the effect that the surviving entity shall (i) be able to meet the financial tests for the issuance (on a pro forma basis) of at least one dollar of Additional Bonds immediately subsequent to such acquisition, lease, consolidation or merger and (ii) except in the case of a lessee under any lease, shall have a net worth immediately subsequent to such acquisition, consolidation or merger at least equal to 90% of the net worth of the Sublessee immediately prior to such acquisition, consolidation or merger; and

(h) provided further that none of the other corporations which is a party to such consolidation, lease, merger or transfer shall have any pending litigation which, in the opinion of counsel to the Sublessee (which may be rendered in reliance upon the opinion of counsel to such other corporation), might reasonably result in a substantial adverse judgment. For the purposes of the preceding sentence, the terms "substantial adverse judgment" shall mean a judgment in an amount which exceeds the insurance or reserves therefor by a sum which is more than two percent of the

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NCMC BOARD OF TRUSTEES
BOARD TRANSMITTAL

TRANSMITTAL: 1
AGENDA ITEM: 8B

TO:	FROM:
BOARD OF TRUSTEES	LEE MORRISON
December 18, 1995	December 18, 1995

RECOMMENDATION/REQUEST:

To approve the Second Articles of Amendment to the Articles of Incorporate for NCMC, Inc., as outlined in the attached.

ACTION REQUIRED:

Vote to approve.

SUMMARY:

As required by the Internal Revenue Service (IRS) the NCMC, Inc., Articles of Incorporation have been revised to provide for a stronger relationship between NCMC, Inc., and the Board of Trustees. The Articles of Incorporation change will permit NCMC, Inc., to be classified as a support organization by the IRS and not a private foundation.

FINANCIAL IMPLICATIONS:

None.

CONTACT(S) FOR ADDITIONAL INFORMATION:

Robert Harmon, Executive Director, NCMC Board of Directors (350-6052)

Ellen Stewart, Attorney at Law for NCMC, Inc., (299-8929)

Lee Morrison, County Attorney (356-4000)

RESOLUTION

RE: APPROVE CONSENT TO FOURTH SUPPLEMENTAL LEASE BETWEEN COLORADO HEALTH FACILITIES AUTHORITY AND BOARD OF TRUSTEES FOR NORTH COLORADO MEDICAL CENTER AND APPROVAL OF FIRST AMENDMENT TO THIRD AMENDED AND RESTATED OPERATING SUBLEASE AND AUTHORIZE CHAIRMAN TO SIGN

WHEREAS, the Board of County Commissioners of Weld County, Colorado, pursuant to Colorado statute and the Weld County Home Rule Charter, is vested with the authority of administering the affairs of Weld County, Colorado, and

WHEREAS, the Board has been presented with a Consent to the Fourth Supplemental Lease between Colorado Health Facilities Authority and Board of Trustees for North Colorado Medical Center, with terms and conditions being as stated in said documents, and

WHEREAS, after review, the Board deems it advisable to consent to said lease, a copy of which is attached hereto and incorporated herein by reference.

NOW, THEREFORE, BE IT RESOLVED by the Board of County Commissioners of Weld County, Colorado, that the Consent to the Fourth Supplemental Lease between Colorado Health Facilities Authority and Board of Trustees for North Colorado Medical Center and approval of First Amendment to Third Amended and Restated Operating Sublease be, and hereby is, approved.

BE IT FURTHER RESOLVED by the Board that the Chairman be, and hereby is, authorized to sign said consent.

The above and foregoing Resolution was, on motion duly made and seconded, adopted by the following vote on the 28th day of December, A.D., 1994.

ATTEST:
/s/ Donald D. Warden
Weld County Clerk
to the Board

BY: /s/ Carol A. Harding
Deputy Clerk to
the Board

APPROVED AS TO FORM:

/s/ [Illegible]
County Attorney

BOARD OF COUNTY
COMMISSIONERS
WELD COUNTY,
COLORADO

/s/ W. H. Webster
W. H. Webster,
Chairman

/s/ Dale K. Hall
Dale K. Hall, Pro Tem

/s/ George E. Baxter
George E. Baxter

/s/ Constance L. Harbert
Constance L. Harbert

/s/ Barbara J. Kirkmeyer
Barbara J. Kirkmeyer

RESOLUTION

RE: CONSENT TO SECOND ARTICLES OF AMENDMENT TO THE ARTICLES OF INCORPORATION FOR NCMC, INC.

WHEREAS, the Board of County Commissioners of Weld County, Colorado, pursuant to Colorado statute and the Weld County Home Rule Charter, is vested with the authority of administering the affairs of Weld County, Colorado, and

WHEREAS, the Board has been presented with the Second Articles of Amendment to the Articles of Incorporation for NCMC (North Colorado Medical Center), Inc., and

WHEREAS, after review, the Board deems it advisable to consent to said second articles of amendment, a copy of which is attached hereto and incorporated herein by reference.

NOW, THEREFORE, BE IT RESOLVED that the Board of County Commissioners of Weld County, Colorado, be, and hereby consents to the Second Articles of Amendment to the Articles of Incorporation for NCMC, Inc.

The above and foregoing Resolution was, on motion duly made and seconded, adopted by the following vote on the 10th day of January, A.D., 1996.

ATTEST:
/s/ Donald D. Warden
Weld County Clerk
to the Board

BY: /s/ Shelly K. Miller
Deputy Clerk to
the Board

APPROVED AS TO FORM:

/s/ [Illegible]
County Attorney

BOARD OF COUNTY
COMMISSIONERS
WELD COUNTY,
COLORADO

/s/ Barbara J. Kirkmeyer
Barbara J. Kirkmeyer,
Chair

/s/ George E. Baxter
George E. Baxter,
Pro Tem

/s/ Dale K. Hall
Dale K. Hall

/s/ Constance L. Harbert
Constance L. Harbert

/s/ W. H. Webster
W. H. Webster

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(2)

No. 01-845

In The

Supreme Court of the United States

WILLIAM JOHN NICHOLAS, M.D.,

Petitioner,

v.

NORTH COLORADO MEDICAL CENTER, INC., a Colorado corporation and its Governing Board of Directors; RICHARD H. STENNER, its President; KARL B. GILLS, its Executive Vice-President; ALYCE KANTNER, its former Director of Medical Services; and PAT (WILSON) KERN, its Director of Cardiovascular Services,

Respondents.

Supreme Court, U.S.
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On Petition For Writ Of Certiorari
To The Colorado Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPPOSITION TO WRIT OF PETITION FOR CERTIORARI

Respondents North Colorado Medical Center, Inc., a Colorado corporation and its Governing Board of Directors; Richard H. Stenner, its President; Karl B. Gills, its Executive Vice-President; Alyce Kantner, its former Director of Medical Services; and Pat (Wilson) Kern, its Director of Cardiovascular Services (herein "Respondents"), respectfully pray that the Court deny the Petition for Writ of Certiorari to review the final judgment and decision of the Supreme Court of the State of Colorado entered in the above proceedings on August 6, 2001.

OPINIONS BELOW

The final opinion of the Colorado Supreme Court decided June 25, 2001, as modified on denial of rehearing on August 6, 2001, was reported at 27 P.3d 828, and is reprinted in the Appendix to the Petition for Certiorari at App. 1-37. The August 6, 2001 Order of the Court modifying the June 25, 2001 opinion, and denying Petitioner's Petition for Rehearing is reprinted in the Petition for Certiorari, App. 79-80. The Colorado Supreme Court reversed the opinion of the Colorado Court of Appeals decided on December 9, 1999, as modified on Denial of Rehearing and reported at 12 P.3d 280, reprinted in the appendix to the Petition for Certiorari, App. 38-58. The Order Granting Partial Summary Judgment in favor of Respondents on the claim for relief pursuant to 42 U.S.C. § 1983 is reprinted in the appendix hereto, App. 1-2. The trial court's order denying reconsideration of its Order

pursuant to 42 U.S.C. § 1983 is reprinted in the appendix hereto, App. 3-5. The Findings of Facts, Conclusions of Law and Order of Immunity issued by the trial court is reprinted in the appendix hereto, App. 6-15.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to those constitutional provisions and statutes cited in the Petition, the following pertinent language contained in the *Health Care Quality Improvement Act of 1986*, found at 42 U.S.C. § 11111 through 11115 (herein "HCQIA") is:

> **§ 11112(a) In general**
>
> For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken –
>
> (1) in the reasonable belief that the action was in the furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).
>
> A professional review action shall be presumed to have met the preceding standards necessary

for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

STATEMENT OF THE CASE

Respondent North Colorado Medical Center, Inc. (herein "NCMC") is a 326 bed general acute hospital situated in Greeley, Colorado. At all times relevant it has been incorporated as a private, not for profit corporation pursuant to 26 U.S.C. § 501(c)(3). The individually-named Respondents, Richard H. Stenner, Karl B. Gills, Alyce B. Kantner and Pat (Wilson) Kern were at times relevant employees and executives of NCMC who participated in Nicholas's professional review process. For the sake of brevity, Respondents will be collectively referred to as "NCMC" or "the hospital" unless otherwise noted.

Petitioner William John Nicholas, M.D. (herein "Nicholas") is an invasive and interventional cardiologist, specially trained to place catheters into the human heart to prevent or terminate heart attacks and to conduct invasive studies of the vessels of the heart.

In 1989, Nicholas, who had just completed his invasive cardiology training, accepted employment with the Greeley Medical Clinic (herein "GMC"), an association of physicians in Greeley, Colorado. At the time, there were three other invasive cardiologists employed by GMC. Since GMC did not have a cardiac catheterization laboratory on site, Nicholas sought and obtained provisional

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privileges[1] to practice at NCMC, which owned and operated a cardiac catheterization laboratory.

Shortly after Nicholas's arrival, the hospital's Medical Quality Assurance Committee (Q.A. Committee) began to receive reports of adverse incidents associated with Nicholas's cases. During the pendency of the investigation of Nicholas's practice, his privileges in the cardiac catheterization lab were summarily suspended by Nicholas's cardiology proctor. (Record, Vol. 2, p. 326; Vol. 11, p. 2973) At the same time, Nicholas's employment with GMC was terminated by unanimous consent of its cardiology department, based upon serious concerns over Nicholas's practice. (Record, Vol. 2, p. 315; p. 323)

Contrary to the allegations made by Nicholas in his Brief, the record demonstrates that it was Nicholas's termination from GMC, his suspension from the cardiac catheterization laboratory and the gravity of the cases already under review by the Quality Assurance Committee that led the committee to seek an independent, outside review of Nicholas's practice. (App. 16-18; Record, Vol. 2, pp. 315, 323, 326; Vol. 11, p. 2973) A well-regarded expert from California was retained for this review.

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[1] As per NCMC's medical staff bylaws, all new staff appointees at NCMC were required to undergo a proctorship with an active member of the medical staff and remain on provisional status for one year. At the end of the year, the provisional staff member could request advancement to the active or courtesy staff as per the bylaws. In no case could a provisional staff member remain on the provisional staff for more than two years.

Following a site visit, staff interviews, an interview with Nicholas and a review of relevant medical records and catheterization films, the outside expert concluded that Nicholas demonstrated severe deficiencies in his invasive cardiology practice. (Record, Vol. 26, pp. 1653-56)

On July 2, 1991, NCMC's Credentials Subcommittee – which is charged with making recommendations as to physician privileges – reviewed Nicholas's request for advancement to active status on the medical staff. In so doing, it considered and received the concerns of the QA Committee, the report of the outside reviewer, and a response from Nicholas.

Following deliberation and review, the Credentials Subcommittee determined that Nicholas's continued invasive cardiology practice posed a risk to the health and welfare of the patients of NCMC and directed Respondent Stenner, President of NCMC, to summarily suspend Nicholas's invasive cardiology privileges pending further investigation and review as per the hospital's bylaws. (Record, Vol. 11, p. 2974; Vol. 32, T. 1, Appendix A, July 2, 1991 Minutes)

The Credentials Subcommittee thereafter retained three additional independent cardiologists to review Nicholas's practice. The Credentials Subcommittee also interviewed numerous witnesses from the medical and nursing staff, including Nicholas. The three outside reviewers returned criticisms of Nicholas's practice that equaled – if not exceeded – those made by the first expert. Among other things, one reviewer found Nicholas's approach to a particular case "dangerous and irresponsible" while another reviewer found Nicholas's

practice to be "below accepted standards of care," with his documentation of the case "extremely poor, and in fact, inaccurate. . . . " The third reviewer concluded that Nicholas prescribed a contraindicated drug for one of his patients, causing her death. (Record, Vol. 26, pp. 1555-73) The investigation by the Credentials Subcommittee revealed additional concerns regarding Nicholas's practice, including personality conflicts with staff and allegations of dishonesty.

The Credentials Subcommittee recommended that NCMC suspend Nicholas's invasive cardiology privileges pending further review. This recommendation triggered NCMC's Fair Hearing Plan, which entitled Nicholas to a hearing before an impartial panel of three physicians not in competition with Nicholas. The Fair Hearing Panel met in March, 1992, and received testimony, argument and exhibits from Nicholas, through his attorney, and also from the Credentials Subcommittee, through its attorney.

The Fair Hearing Panel concluded, *inter alia*, that Nicholas continued to exhibit "a definite inability to form a rational treatment plan based on a logical progression of thought." It recommended that Nicholas receive invasive cardiology privileges, but that he be proctored for a period of time and that his cases continue to be monitored by another physician, at Nicholas's expense. (Record, Vol. 11, p. 2974; Vol. 36, pp. 145-6)

Both Nicholas and the Credentials Subcommittee appealed the Fair Hearing Panel's recommendations to the House Committee of the Board of Directors. In May, 1992, the House Committee met to determine the appeals.

The process included receiving the report of the Credentials Subcommittee, the report of the Fair Hearing Panel, the transcript of the Fair Hearing, all exhibits introduced at the Fair Hearing, the written appeals of Nicholas and the Credentials Subcommittee, and argument of counsel for both parties.

Following extensive deliberation, the House Committee found that the Fair Hearing Panel and the Credentials Subcommittee had reached essentially the same conclusion, namely, that Nicholas exhibited deficiencies in both medical judgment and documentation. However, the House Committee determined that a more appropriate remedy was continued suspension of Nicholas's invasive cardiology privileges with the ability to apply for reinstatement of his privileges after one year. (Record, Vol. 11, p. 2975; Vol. 36, p. 153)

The House Committee felt that this remedy was sufficient for Nicholas to maintain his non-invasive privileges at NCMC while seeking additional training in invasive cardiology. The Board of Directors of NCMC[2] approved the House Committee's recommendation.

Following the board action, Nicholas filed an anti-competitive conduct complaint with the Committee on

---

[2] Nicholas alleges, at p. 8, that "[m]embers of the investigative subcommittee were also members of the Board of Directors. This is an inaccurate implication. Only one member of the Credentials Subcommittee – Ken Lind – actually participated in the decision of the Board of Directors. The other joint member, Dr. Paul Hiratzka, recused himself from the Board's deliberations.

Anticompetitive Conduct (herein "CAC")[3] and a separate civil damages suit in the Weld County District Court.

The instant civil damages suit includes numerous claims for relief, including a claim under 42 U.S.C. § 1983. On December 4, 1997, the trial court granted summary judgment in favor of the Respondents on Nicholas's § 1983 claim. (App. 1-3) Nicholas petitioned the trial court for reconsideration of its decision on the § 1983 claims, arguing that the court had improperly found NCMC to be a private hospital, in derogation of *Milo v. Cushing Mun. Hosp.*, 861 F.2d 1194 (10th Cir. 1988). In its January, 1998 order denying the motion for reconsideration, the trial court further explained its ruling on the § 1983 claims. (App. 4-7)

The court noted that there was "no dispute" as to the fact that NCMC was a private hospital. (App. 5) The decision was based upon voluminous documents filed with the Court, including documents attached to Nicholas's Petition at App. 81-144, affidavits and deposition transcripts untraversed by Nicholas.

From January 26 through February 6, 1998, the trial court held a hearing to determine whether Defendants were entitled to immunity pursuant to C.R.S. § 12-36.5-101, *et seq.* and 42 U.S.C. § 11111, *et seq.* Both sides presented evidence, called witnesses and argued the law in support of their positions. During the course of

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[3] As discussed in Petitioner's brief, the CAC is the Committee on Anticompetitive Conduct, which was created by the Colorado Professional Review Act (herein "CPRA"), C.R.S. § 12-36.5-106.

the hearing, Nicholas stipulated that the conduct of the hospital's Medicine QA Committee, Credentials Subcommittee and Fair Hearing committees was reasonable, appropriate, and undertaken in good faith. (App. 10-11)

The remaining issues to be determined by the trial court were whether the conduct of the NCMC House Committee and Board of Directors fell within the immunity standards set forth under the CPRA and HCQIA. On June 5, 1998, the trial court made detailed findings and fact and conclusions of law and entered summary judgment in favor of Defendants and against Plaintiff under the immunity provisions of CPRA and HCQIA. (App. 8-28)

Nicholas appealed the trial court's dismissal of the § 1983 claims as well as the court's June 5, 1998 order of summary judgment. In its modified decision of April 13, 2000, the Colorado Court of Appeals reversed the trial court on all issues, and remanded for further proceedings.

In its decision rendered August 6, 2001, the Colorado Supreme Court reversed the Colorado Court of Appeals. It held, *inter alia*, that professional peer review conducted by private medical facilities does not constitute state action for the purposes of 42 U.S.C. § 1983. It further held that, as a matter of law, the conduct of the Respondents and their various committees satisfied the immunity provisions of the CPRA and HCQIA thereby conferring statutory immunity from suit and damages. Nicholas now seeks this Court's writ of certiorari.

ARGUMENT

S. Ct. Rule 10 illustrates some of the considerations governing review on certiorari. It states, *inter alia*, that, "a petition for a writ of certiorari will be granted only for compelling reasons." It further states that "a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

The reasons for review advanced by Nicholas in his petition are neither compelling nor indicative of a misapplication of existing law by the Colorado Supreme Court. Rather, Nicholas argues that the Colorado Supreme Court made erroneous factual findings and/or misapplied the law in his case.

Respondents contend that apart from lack of a compelling issue, this Court should deny the petition because the Colorado Supreme Court correctly followed established state and federal law, and its decision does not conflict with the decisions of this Court or the decisions of federal circuit courts of appeal deciding similar issues.

I.

THE COLORADO SUPREME COURT'S RULING ON NICHOLAS'S § 1983 CLAIMS IS NEITHER AN IMPORTANT FEDERAL QUESTION NOR IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT

The Colorado Supreme Court's determination that NCMC is a private hospital, as a matter of law, is not a "compelling" issue or a finding inconsonant with decisions of this Court. The decision was correct in light of

the record, and the best Nicholas can argue is that the decision *misapplies* the law, as opposed to *conflicts* with federal case law.

Nicholas argues that the Court should not have analyzed NCMC's "private/public" status under the "fair attribution" test of *Lugar v. Edmondson Oil Company, Inc.*, 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982) because NCMC was a public or quasi-public entity. He contends that the Court should have applied the "public function" test under *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961) and *Milo v. Cushing Mun. Hospital*, 861 F.2d 1194 (10th Cir. 1988). Nicholas's legal analysis is incorrect.

The Colorado Supreme Court applied the proper test under *Lugar, supra*, and as discussed below, the outcome would have been the same even if the "public function" test been employed.

The "public function" test is improper in the case at bar because it presupposes a relationship between the state and the private entity so intertwined that the actions of the private entity are deemed to be those of the state. For example, the private hospital in *Milo* – the facts of which form the basis of Nicholas's argument – was governed by a Board of Trustees established under 60 OKLA. ST. ANN. § 176. Under that statute, the board was comprised of state officials clothed with the same authority and responsibility as elected public officials. *See, Tarabishi v. McAlester Regional Hospital*, 827 F.2d 648 (10th Cir. 1987). In fact, the trustees were public officials who were required to take an oath of office. *Id.*

As a result of this enabling statute, the court held, as a matter of law, that such facilities *in Oklahoma* are public hospitals because the management of state and hospital are significantly intertwined. *Milo* at 1196. By comparison, the "enabling statute" in the instant matter, C.R.S. § 25-3-302(1), requires the opposite result. That statute provides that hospital trustees shall not be "elective or appointed state, county or city officials," and thus not clothed with state authority.

The hospital in *Milo, supra,* is also structurally distinguishable from NCMC. In *Milo,* the city continued to maintain a significant amount of control over the hospital's operations, whereas Weld County has *no authority* over NCMC. In *Milo,* the city was entitled to take the profits of the hospital, and the five-person board of trustees was comprised of a majority of city commissioners. The hospital was supported by city mill levies, and the hospital was ultimately accountable to the city.

None of those factors are present at NCMC. At all relevant times, NCMC's board was comprised of a majority of non-trustees.[4] (Record, Vol. 7, p. 1639) The minority trustee members were independent from the county commissioners, and by law, were not state officials. Weld County did not take profits from NCMC, and NCMC was not required to report to Weld County. (Record, Vol. 7, p.

---

[4] Although Nicholas argues that the trustees constituted a "majority" of the NCMC Board in 1991, the record reflects that as of 1992 – when the final board action was entered – a minority of the members of the NCMC Board were Trustee members. (Petitioner's App. 111-112).

1638) Weld County had no authority over NCMC's management, and took no part in its credentialing decisions. (Record, Vol. 6, pp. 1193-1257; pp. 1511-13; (Petitioner's App. 9-10). Although the hospital had previously received county tax dollars, by the time of the final board action in 1992, NCMC no longer collected tax levies from Weld County[5]. (Vol. 6, p.1485)

The Court therefore properly applied the tests set forth in *Lugar* and *Blum v. Yaretsky*, 457 U.S. 991 (1982). However, even if the Court had followed the test annunciated in *Milo, supra,* and *Burton, supra,* the same result would have been reached.

Under the "public function" test, the Court should consider three factors in determining whether a private hospital is a state actor for purposes of § 1983: (1) whether the County receives a "direct financial benefit" from the private lessee; (2) whether the County "benefitted" from the actual complained of violation(s); and (3) whether the County retained "control [of] and responsibility" for the hospital; *Moore v. Wyoming Medical Center,* 825 F.Supp. 1531 (D. Wyo. 1993), *relying upon Milo, supra,* and *Jatoi v. Hurst-Euless-Bedford Hosp. Auth.*, 807 F.2d 1214 (5th Cir. 1991).

Nicholas cannot proffer any evidence that Weld County somehow "benefitted" from the restriction of

---

[5] The document upon which Nicholas relies to demonstrate that NCMC received county tax support shows mill levies spent in 1989 and 1990, long before the final board action in the instant matter, and before NCMC restructured the composition of its Board of Directors. (Petitioner's App. 109).

Nicholas's privileges. He is similarly unable to demonstrate that the County exercised control of or responsibility over the hospital and its credentialing function. As a result, the Court's supposed misapplication of the law had no effect on the outcome of the case, and is therefore a reason insufficient to seek this Court's review.

II.

"STATE ACTION" UNDER THE CPRA IS NOT STATE ACTION SUFFICIENT TO SUPPORT A § 1983 CLAIM

Nicholas next argues that the Colorado Supreme Court *misapplied* the law when it determined that "active state supervision" for the purpose of antitrust immunity is different than "state action" under § 1983. Nicholas is incorrect. In addition, the meaning of the CPRA involves an interpretation of state law, which makes it a less compelling issue for this Court's review. *See, e.g., Lehman Bros. v. Schein*, 416 U.S. 386 (1974).

The doctrine of state action immunity originated with *Parker v. Brown*, 317 U.S. 341 (1943). It provides that a private entity's activity is insulated from antitrust liability if its anticompetitive conduct furthers an important state interest. State action immunity requires that the activity be clearly articulated and affirmatively expressed as state policy, and the state must actively supervise the activities of the private entity. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992).

"State action" under § 1983 is an entirely different concept. § 1983 requires that the activity performed by the private entity has been "traditionally the exclusive prerogative of the state," *Rendell-Baker v. Kohn*, 457 U.S.

830 (1982), and must also be "fairly attributable to the state." *Lugar, supra.*

Contrary to Nicholas's assertions, the CPRA does not transform professional review at private hospitals into § 1983 "state action." As correctly expressed by the Colorado Supreme Court, "the Sherman Act was directed toward 'individual and not state action,' and that state regulatory schemes cannot violate it." (Petitioner's App. 13, *citing California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 104 (1980)). Moreover, the enactment of the CPRA does not change the fact that professional review by private hospitals "has not been viewed as the prerogative of the state." (Petitioner's App. 11, *citing Berg v. Shapiro*, 948 P.2d 59, 61 (Colo. App. 1997)). *See also, Wong v. Stripling*, 881 F.2d 200, 202 (5th Cir. 1989).

The Court was also correct in its holding that "state action" for the purposes of § 1983 is different than state action for the purposes of antitrust immunity. "Similar sounding phrases often have different meanings when applied in different legal contexts. This is such a case. . . . [T]he elements required for a cause of action under section 1983 differ from the elements required for state action under the antitrust laws." (Petitioner's App. 14, *citing Ezpeleta v. Sisters of Mercy Health Corp.*, 800 F.2d 119, 122 (7th Cir. 1986)).

The CPRA was created in response to this Court's decision in *Patrick v. Burget*, 486 U.S. 94 (1998). *See, Frederick W. Yu,* THE COMMITTEE ON ANTICOMPETITIVE CONDUCT: NEW AGENCY ON THE BLOCK, 21 Colo. Law. 31 (January, 1992). The CPRA creates a system of active supervision of the credentialing activities of all hospitals

via the Committee on Anticompetitive Conduct (herein "CAC"), an independent committee of the Colorado Board of Medical Examiners. C.R.S. § 12-36.5-106(1). The CAC's *sole purpose* is to oversee any professional review proceeding which was allegedly the result of "anticompetitive conduct." C.R.S. § 12-36.5-106(9)(f).

Under the CPRA, a physician affected by a credentialing decision allegedly resulting from anticompetitive conduct has as his *sole and exclusive remedy* a proceeding before the CAC. The CAC does not have the power to award damages, but rather has the power to disapprove, set aside or modify any professional review action that resulted from anticompetitive conduct. C.R.S. § 12-36.5-106(9)(k).[6] Physicians aggrieved by the credentialing process may therefore pursue claims for civil damages in a parallel state court action, but may not bring an antitrust claim in that action. § 106(7).

The CPRA does not impose any standards on professional reviewers. It merely grants immunity to reviewers who act in good faith and provide the physician with proper notice and hearing procedures. *See*, §§ 104, 105. It

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[6] The CPRA also provides "safe harbor" immunity which essentially parrots the immunity provisions of the Federal Health Care Quality Improvement Act (herein "HCQIA"), 42 U.S.C. § 11111, *et seq*. Under the CPRA, hospitals engaging in peer review, as well as the members and participants in the peer review process are granted immunity from suit, so long as they follow the prescribed notice, hearing and factfinding requirements. C.R.S. § 12-36.5-104. Those individuals and entities are also afforded "good faith" immunity under the statute. § 105.

is designed to shield and immunize peer review organizations meeting its requirements. It is not, as Nicholas suggests, a sword for use by aggrieved physicians to *require* notice, hearing and factfinding procedures of private hospitals.

The CPRA does not require, as a condition of immunity,[7] that a hospital fully and completely insulate its adjudicatory process from its investigative processes. As the Colorado Supreme Court correctly noted, "there is no logical or legal inconsistency in a certain mixing of investigative and adjudicative roles in administrative proceedings." (Petitioner's App. 34, *citing Withrow v. Larkin*, 421 U.S. 35 (1975)).

There is also no requirement that the NCMC Board blindly adopt the conclusions and recommendations of the Fair Hearing Panel. Several circuit courts facing similar facts have ruled in favor of immunity for hospital boards that have modified, ignored or otherwise failed to adopt the credentialing recommendations made by a physician hearing panel. *See, e.g., Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318, 1332-33 (11th Cir. 1994); *Gabaldoni v. Washington County Hospital Ass'n*, 250 F.3d 255 (4th Cir. 2001); and *Sugarbaker v. SSM Health Care*, 190 F.3d 905 (8th Cir. 1999).

Finally, "decisions that take place during the peer review process in a private hospital 'ultimately turn on medical judgments made by private parties according to

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[7] In *Sugarbaker, Bryan,* and *Gabaldoni, supra,* circuit courts upheld immunity in cases where there was clear commingling of the investigative and adjudicative processes.

professional standards that are not established by the State.' " (Petitioner's App. 11, *citing Blum v. Yaretsky, supra,* 457 U.S. at 1008). The decision to suspend Nicholas's invasive cardiology privileges was based upon medical criteria developed by the physicians on NCMC's professional review committees, and was "not compelled or even influenced by any state regulation." (Petitioner's App. 12, *citing Rendell-Baker, supra* at 841). As a result, the CPRA does not transform professional review by private hospitals into state action for the purposes of § 1983.

In short, Nicholas asks this Court to review the Colorado Supreme Court's interpretation of state law governing peer review. This is in and of itself sufficient reason for this Court to decline certiorari on this issue.

To the extent that the Court's interpretation of the CPRA touches on federal law, this Court should decline review because the Colorado Supreme Court applied legal standards consistent with the decisions of this Court.

III.

THE IMMUNITY PROCEDURE REQUIRED BY THE HCQIA WAS CORRECTLY INTERPRETED BY THE COLORADO SUPREME COURT

Nicholas's final argument is that the Colorado Supreme Court misapplied the legal standard for statutory immunity under the HCQIA. In support of this position, Nicholas argues that the Court erred in deciding immunity issues *de novo,* and as a matter of law, in the face of disputed factual matters. The procedure proposed by Nicholas – that any "disputed fact" be decided by a

jury – is untenable and contrary to the letter and spirit of HCQIA.

42 U.S.C. § 11112(a) gives NCMC a *presumption* of immunity. That presumption can be rebutted only if Nicholas demonstrates, by a preponderance of the evidence, that NCMC did not undertake the action in the furtherance of quality health care; that it didn't act to reasonably obtain the facts; that it didn't provide adequate notice and hearing; or that it didn't act in the reasonable belief that the action was warranted by the facts.

Courts are empowered to determine issues of immunity after the record has been sufficiently developed. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The purpose underlying the prompt judicial determination of immunity is to prevent defendants from being subjected to the prohibitive costs of defending meritless claims. *Id.*

HCQIA clearly authorizes (and even encourages) courts to determine immunity issues prior to trial. *See, e.g., Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318, 1332-33 (11th Cir. 1994); *Gabaldoni v. Washington County Hospital Ass'n*, 250 F.3d 255 (4th Cir. 2001); *see also, Sugarbaker v. SSM Health Care*, 190 F.3d 905 (8th Cir. 1999); *Brader v. Allegheny General Hospital*, 167 F.3d 832 (3rd Cir. 1999).

In ruling on HCQIA immunity, the court must utilize "an unconventional standard in determining whether [the peer reviewer] was entitled to summary judgment – whether a reasonable jury, viewing all facts in a light most favorable to [the physician], could conclude that he had shown, by a preponderance of the evidence, that [the

peer reviewer's] actions fell outside the scope of § 11112(a)." *Gabaldoni, supra; see also, Sugarbaker, supra; Brader, supra.* "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The Colorado Supreme Court correctly followed these precepts in determining that Respondents are entitled to immunity from damages as a matter of law. It determined, notwithstanding Nicholas's arguments that the CAC found the existence of anticompetitive motives,[8] that NCMC reasonably believed that the restriction of Nicholas's invasive privileges "would restrict incompetent behavior or would protect patients." (Petitioner's App. 20).

The Court properly determined that NCMC had restricted the privileges only after extensive investigation, hearing and factfinding had taken place, including the review by four independent physicians; investigation by the QA Committee and Credentials Subcommittee; an evidentiary hearing before the Fair Hearing Panel; and a review of the entire matter by the House Committee. The

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[8] Nicholas argues that the Colorado Supreme Court erred in not adopting the findings and conclusions of the CAC. However, the CAC is limited, by statute, to an eight-hour hearing on the *sole issue* of anticompetitive conduct. C.R.S. § 12-36.5-106. The findings and conclusions of the CAC are therefore not binding precedent under the theories of collateral estoppel or res judicata, and do not alter the requirement that the court rule upon HCQIA immunity as a matter of law.

Court noted that "Nicholas has introduced no evidence to suggest that NCMC did not make reasonable efforts to obtain the facts prior to the decision of the Board of Directors." (Petitioner's App. 22).

The Colorado Supreme Court also correctly concluded that NCMC complied with all notice and hearing procedures required by HCQIA. In particular, it held a Fair Hearing in which Nicholas was allowed, with the assistance of counsel, to call witnesses, offer exhibits and make argument in support of his position. Nicholas was informed as to his rights throughout the review, and was provided written decisions at all stages of the proceeding. Based upon these undisputed facts, the Court concluded "[t]here is no evidence in the record to suggest that Nicholas was not afforded adequate notice or was denied a fair hearing." (Petitioner's App. 23). Finally, the Court reached the proper conclusion that NCMC had a factual basis for its decision, based upon the voluminous materials, testimony, reports and exhibits reviewed by NCMC prior to making its decision.

The power of the Colorado Supreme Court to confer immunity upon NCMC is undisputed. This Court should therefore decline to review the Colorado Supreme Court's determination of HCQIA immunity based upon the lack of a compelling issue and because the Court properly applied federal law in reaching its conclusions.

CONCLUSION

Nicholas has failed to demonstrate a compelling issue upon which certiorari should be granted. At best,

he has argued that the Colorado Supreme Court misapplied the law in his case. As such, he has failed to advance any reason why this Court should grant certiorari.

Respondents therefore pray that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Counsel for Respondents

DISTRICT COURT, COUNTY OF WELD,
STATE OF COLORADO
Case No. 93 CV 329 Division I

ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS ON PLAINTIFF'S ELEVENTH CLAIM FOR RELIEF PURSUANT TO 42 U.S.C. § 1983

(Filed Dec. 4, 1997)

WILLIAM JOHN NICHOLAS,

Plaintiff,

v.

NORTH COLORADO MEDICAL CENTER, INC., a Colorado corporation, commonly referred to as NCMC, and its Board of Directors; Richard H. Stenner, its President; Karl B. Gills, its Executive Vice-President; Alyce Kantner, its former Director of Medical Services; Pat (Wilson) Kern, its director of Cardiovascular Services; and Defendants Doe 1 and 15,

Defendants.

THIS MATTER comes before the court on Defendant's Motion for Summary Judgment. In this Order, the Court will only address Plaintiff's Eleventh Claim for Relief under 42 U.S.C. § 1983.

This suit arises out of the suspension of Plaintiff, Dr. William John Nicholas, from certain hospital privileges at North Colorado Medical Center. The hospital suspended his privileges after a professional review process, which

included investigation by the hospital's Quality Assurance Committee, its House Subcommittee, its House Committee, and a Fair Hearing Panel. Nicholas is alleging that the members of these panels and certain other hospital administrators ousted him from the hospital without due process, in bad faith, and with an anticompetitive intent.

In order to bring a claim under 42 U.S.C. § 1983, the defendants' actions must qualify as "state action." Thus, the question here is whether the hospital's peer review process qualifies as "state action."

The *Berg* cases speaks directly to this issue. *Berg v. Shapiro*, 95 CA 1899 (Colo. App. Div. I), 1997 WL 184000 (April 17, 1997). In that case, the Court of Appeals held that professional peer review at a private hospital did not qualify as "state action" for purposes of 42 U.S.C. § 1983.

NCMC is a private, non-profit corporation. Thus, its actions are not "state actions" for purposes of 42 U.S.C. § 1983. Therefore, Plaintiff cannot bring a claim against Defendants pursuant to this statute.

The Court would like to note that the above analysis does not mean that Defendants' actions do not qualify for immunity under C.R.S. 12-36.5-101, et seq. or 42 U.S.C. § 11111, et seq. While the *Berg* court held that a private hospital's peer review action is not "state action" for purposes of § 1983, that same court indicated that professional peer review at a private hospital is "clothed with the status of a state agency" concerning issues of anticompetitive conduct under CRS 12-36.5-106. Thus, the immunity issues in this case are still alive and will be decided by the court at a later date.

IT IS ORDERED:

Plaintiff's eleventh claim for relief based on 42 U.S.C. § 1983 is DISMISSED with prejudice.

DATED: DEC 04 1997

/s/ William L. West
William L. West
District Court Judge

DISTRICT COURT, COUNTY OF WELD,
STATE OF COLORADO

Case No. 93 CV 329

ORDER

(Filed Jan. 17, 1998)

JOHN NICHOLAS, Plaintiff,

v.

NORTH COLORADO MEDICAL CENTER, INC., et. al., Defendant,

This matter comes before the Court on the Plaintiff's Motion to Reconsider the Court's Order Dismissing Plaintiff's § 1983 claim (Plaintiff's 11th Claim for Relief). Admittedly, the court did not address a number of Plaintiff's arguments in its short decision. The Court cited *Berg v. Shapiro* (Colo. App. 1997) 948 P.2d 59 (95 CA 1899), for the proposition that a private hospital's use of a peer review committee does not make the actions of the hospital state action for purposes of § 1983. At the time of the Court's Order, certiorari was pending in *Berg*. Since then certiorari has been denied, and is binding on this Court in the absence of any other state court decision.

The *Berg* case dealt with a private hospital. I did not discuss in my prior Order Plaintiff's argument that NCMC is a public hospital. The issue in this case is whether the denial of Dr. Nicholas' privileges was state action. In order for Plaintiff to establish his § 1983 claims he must show that Weld County exercises such dominion and control over the Hospital's physician credentialling

functions that the revocation of Dr. Nicholas's privileges constitutes state action.

It is not disputed that the Hospital is a private entity. Therefore, in order to assert a § 1983 claim the Plaintiff must show a nexus between the state and the challenged action sufficient to establish that the action should fairly be treated as that of the state. *Blum v. Yaretsky* (1982) 457 U.S. 991, 102 Sup. Ct. 2777. The conduct complained of must have been caused by the state's exercise of "coercive power" or must have been caused by the state's provision of "such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state." *Blum*, 457 U.S. 1004, 102 Sup.Ct. 2786.

In *Lo-Seng Yo v. Cibola General Hospital*, (10th Cir. 1983) 706 F2d 306, the court held that probationary sanctions against a doctor did not constitute state action. The court also noted that the hospital's receipt of government funds for construction and operation plus the fact that the hospital was the only hospital within a 60-mile radius were insufficient facts to establish state action. Rather, a substantial nexus must exist between the governmental control alleged and the specific conduct which purportedly constitutes state action.

Tunca v. Lutheran General Hospital (7th Cir. 1988) 844 F2d 411, involved the termination of a doctor's privileges and the Court held that mere ownership of the hospital's land by the county was insufficient to establish state action. As in the instant case, the lease between the county and the hospital did not reserve to the county any right to exercise any management or operational control over the hospital.

The presence of public officials, or the appointment of members to the board of directors of the hospital, does not render decisions of the board state action. *Crowder v. Conlan* (6th Cir. 1984) 740 F2d 447. In Crowder, the court held that the facts that the county owned the facility, provided financing for the construction, and had two public officials on the board were insufficient to establish a nexus between the state and the hospital in regard to its credentialling decisions.

Having reviewed the voluminous materials provided by both parties, I conclude that NCMC was a private hospital and that the County did not retain or exercise any control over the operations and management of the Hospital, and particularly with regard to the Hospital's credentialling decisions.

Plaintiff relies on cases that have applied a "Public Function" test. *Milo v. Cushing Memorial Hospital* (10th Cir 1988) 861 F2d 1194; *Carnes v. Parker* (10th Cir. 1991) 922 F2d 1506; *Moore v. Wyoming Medical Center* (D. Wyo. 1993) 825 F. Supp. 1531; *Burton v. Wilmington Parking Authority* (1961) 356 U.S. 715. Plaintiff's reliance on these cases is misplaced. They all assume that the hospital involved had a pre-existing relationship with the county sufficient to find that the hospital acted in the place of the county. Those are not the facts of the instant case. Rather, in the instant case the County and the Hospital are independent entities, neither having the ability to control the other.

Further, the public function test considers three questions: 1) whether the County receives a direct financial benefit from the lessee, 2) whether the County benefited from the action complained of, and 3) whether the

County retained control of and responsibility for the Hospital. There is no evidence that the County benefited from the restriction of Dr. Nicholas's privileges. The Plaintiff argues that one reason for his discipline was that he did not keep patients in the hospital long enough, thereby depriving the Hospital of income. Without commenting on the strength of that argument, it does not address how the County might benefit. The loss of income may affect the profits of the Hospital, but it does not affect the County.[1]

The third question is also answered in the negative. The County has not retained or exercised any control over the Hospital.

In addition, the cases cited by Plaintiff can be factually distinguished from the instant case.

For the reasons set forth,

IT IS ORDERED:

The Motion for Reconsideration is denied.

Dated: January 17, 1998

/s/ William L. West
William L. West
District Court Judge

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[1] Under the lease, if gross income of the Hospital was sufficiently affected, it could conceivably affect the Hospital's rent payment. Besides being highly speculative, it is highly unlikely.

EXHIBIT "A"

DISTRICT COURT, COUNTY OF WELD,
STATE OF COLORADO

Case No. 93 CV 329

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

(Filed JUN. 05, 98)

JOHN NICHOLAS, Plaintiff,

v.

NORTH COLORADO MEDICAL CENTER, INC.; RICHARD H. STENNER; KARL B. GILLS; ALYCE KANTNER; PAT (WILSON) KERN; and Defendants Doe 1-15, Defendants,

This matter came on for hearing on Defendants' Motion for Summary Judgment on Immunity January 26, 1998 through February 6, 1998. The Plaintiff appeared by Philip A. Nicholas, Esq., W. J. Nicholas, Esq., and Jason Tangeman, Esq. Defendants appeared by Jay M. Reinan, Esq. The Court heard the testimony, received the exhibits, heard the arguments of counsel, and took the matter under advisement. The Court has received both parties' closing briefs.

I

Background

Plaintiff is a licensed physician specializing in cardiology. He came to Greeley in approximately 1989 and

received credentials to practice at North Colorado Medical Center (NCMC). In 1992, the Board of Governors of NCMC revoked his level three privileges to practice invasive cardiology. Plaintiff then filed a complaint under C.R.C.P. 106 for judicial review of the Hospital's administrative decision. (92 CV 447). At the same time, the Plaintiff appealed the Hospital's revocation of Plaintiff's level three privileges to the State Board of Medical Examiners Committee on Anticompetitive Conduct pursuant to CRS 12-36.5-106(7). Proceedings in 92 CV 447 were stayed pending the decision of the State Committee. The Complaint in the instant action was filed July 2, 1993. On July 12, 1993 the State Committee reversed the Hospital Board's decision and ordered Plaintiff's privileges reinstated. That decision was affirmed by the Court of Appeals (*Nicholas v. Northern Colorado Medical Center, Inc.* (Colo.App. 1995) 902 P2d 462) and the Supreme Court (*North Colorado Medical Center, Inc. v. Committee on Anticompetitive Conduct* (Colo.1996) 914 P2d 902). The 92 CV 447 case was dismissed on October 7, 1996.

In the present action, the Third Amended Complaint set fourth [sic] 15 claims for relief. First, Declaratory Judgment; Second, Injunctive Relief; Third, Negligence; Fourth, Breach of Contract; Fifth, Wilful Breach of Contract; Sixth, Defamation; Seventh, Intentional Infliction of Mental Suffering; Eighth, Tortious Interference With Contract; Ninth, Fraud and Misrepresentation; Tenth, breach of Duty of Good Faith and Fair Dealing; Eleventh, Violation of Civil Rights under 42 USC 1983; Twelfth, Anticompetitive Conduct; Thirteenth, Outrageous Conduct; Fourteenth, Abuse of Process; Fifteenth, Arbitrary, Capricious and Unreasonable Conduct.

Several of these claims are no longer at issue. By Order dated October 7, 1996, the Court dismissed the Claims for Declaratory Judgment and Injunctive Relief. By Order dated December 4, 1997, the Court dismissed the §1983 Claim. During the course of the Hearing on Immunity, the Plaintiff voluntarily dismissed the action against Richard Stenner and Pat Kern. In addition, the appeal to the State Committee on Anticompetive Conduct provides the exclusive remedy for Plaintiff's Twelfth Claim for Relief.

II

Nature of the Hearing

Defendants moved for Summary Judgment on the remaining claims on the grounds that they are immune from suit and liability under The Colorado Professional Review Act CRS 12-36.5-101 *et seq.* and the Federal Health Care Quality Improvement Act 42 USC 11111 *et seq.* Immunity is a question of law to be decided by the court. *Trinity Broadcasting v. Westminster* (Colo.1993) 898 P2d 916, 924; *Bryan v. Holmes Regional Med. Ctr.* (11th Cir. 1994) 33 F3d 1318, 1332.[1] During the course of the hearing the Plaintiff acknowledged that he was not challenging the actions or conduct of the Quality Assurance Committee, the Credentials Committee, or the Fair Hearing

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[1] Under section 105 of the Colorado Act, immunity presents an issue of subject matter jurisdiction under CRCP 12(b). Under the Federal Act, the Court must first determine whether the Plaintiff has overcome the presumption. If the Court determines that has met the minimum standards of the Act, summary judgment is appropriate.

Panel.[2] The federal and state acts are similar in some respects, but they are not identical. Both have as their purposes the assurance of quality health care, the protection of people from unprofessional conduct, and the protection of those people who participate in professional peer review activities. In one section, the Colorado Act provides immunity from suit. CRS 12-36.5-105. In another section, it provides immunity from damages. CRS 12-36.5-203. On the other hand, the Federal Act provides a rebuttable presumption of immunity from damages. The Colorado Act does not contain any such presumption, *North Colorado Medical Center v. Committee on Anti-competitive Conduct, supra,* although the Governing Board's decision is entitled to a presumption of validity and regularity. Both the Federal Act and §203 of the Colorado Act require the participants in the review process to act reasonably. In addition, section 105 of the Colorado Act requires the participants to act in "good faith." Both acts require that the professional review activities be conducted in accord with certain procedural guidelines.

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[2] Plaintiff stated he was not arguing bad faith. He was not saying anyone had an evil motive. He was not challenging the actions of the Credentials Subcommittee, he was not challenging the actions of the Fair Hearing Panel. He was only challenging the action of the House Committee and the Board of Directors.

III

The Statutes

A. The Colorado Professional Review of Health Care Providers Act. CRS 12-35.5-101 *et seq.* (PRHCP)

Section 105(1) of the PRHCPA provides immunity from suit to any person who participates in the professional review process so long as such person made a reasonable effort to obtain the facts of the matter, acted in the reasonable belief that the action was warranted by the facts, and otherwise acted in good faith. Section 105(2) provides immunity from suit for damages to the governing board and its individual members and to the entity so long as they act in good faith.

"Good faith" includes reliance on the recommendations of the review committee and requires consideration of any facts not previously available to the peer review committee and that the board act in the reasonable belief that the action taken was warranted by the facts.

"Governing Board" means any governing body or duly authorized subcommittee with final authority under written bylaws, policies, or procedures to take final action regarding the recommendation of any authorized review committee. §12-36.5-102(2).

"Professinoal Review Committee" means any committee authorized under the provisions of this article to review and evaluate the professional conduct and quality of practice of a licensed physician. §12.36.5-102(3).

"Records" includes any and all written or verbal communications by any person, professional review committee, governing board, or staff arising from the activities of a professional review committee.

CRS 12-36.5-104(2) provides that a professional review committee must be composed of a majority of physicians.[3] Subsection (7) provides certain minimum requirements: (a) the physician is entitled to a hearing, (b) a person who was a member of the investigating committee may not be a member of the hearing committee, (c) the physician has a right to reasonable notice, right to be present, right to be represented by counsel, and the right to offer evidence, (d) the hearing committee shall make recommendations to the governing board, and (e) the physician must be given a copy of the recommendations, and shall have a right to appeal the findings and recommendations to the governing board. Subsection (8) provides that the governing board must adopt written bylaws, policies or procedures that provide for a right of appeal, reasonable notice, right to counsel, and the right to appear and offer argument. The bylaws may provide that the appeal be heard by a committee of the governing board.

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[3] There appears to be an exception created for committees created by governing boards that have a professional review committee established pursuant to article 36 of title 12. There is no current reference to professional review committees in article 36 that I can find.

B. CRS 12-36.5-201 *et seq.*

Section 201 essentially adopts the Federal Health Care Quality Improvement Act of 1986, discussed later. It provides immunity from damages for virtually everyone involved in a professional review action, so long as the action taken relates to the competence or professional conduct of a physician.

C The Federal Health Care Quality Improvement Act of 1986. 42 USC §11111, *et seq.* (HCQIA)

Although the chapter of the U.S.C. containing the Federal Act is entitled "Encouraging Good Faith Professional Review Activities," the Federal Act does not actually use the term "Good Faith." It provides broad immunity for persons involved in professional review activity so long as certain standards are met. Section 1112(a) provides that the professional review action must be taken (1) in the reasonable belief that the action was in the furtherance of quality health care, (2) after a reasonable effort to obtain the facts, (3) after adequate notice and fair hearing procedures are afforded the physician, and (4) in the reasonable belief that the action was warranted by the facts. Subsection (b) specifies the notice and hearing requirements, which are substantially the same as required by the Colorado statute.

IV

NCMC Procedures

There are essentially three groups associated with the operation of the hospital: the Board of Directors, the

Administration, and the Medical Staff. The Board of Directors is the governing board and is at the top of the organizational chart. It appoints the President and CEO, who is in charge of the administration. The Chief of the Medical Staff is elected by the Medial Staff. The Medical Staff has bylaws that govern review of patient charts and care and a Quality Assurance Committee that reviews complaints and charts appearing to reflect deficiencies or variances from the norm.[4] The Quality Assurance Committee performs some review and investigation and, if it determines that there is a problem with a physician, it makes recommendations to the Credentials Subcommittee. The Credentials Subcommittee is charged with the responsibility of investigating and making recommendations regarding whether new physicians will be accepted to practice in the hospital and whether physicians already on staff will have privileges suspended, revoked, or limited in some other manner. If a physician receives an adverse finding or recommendation from the Credentials Subcommittee, he or she may request a hearing before a "Fair Hearing Panel," pursuant to the hospitals Corrective Action/Fair Hearing Plan. Under the Plan, either the physician or the Credentials Subcommittee may appeal the findings and recommendations of the Fair Hearing Panel to the House Committee. The House Committee makes its recommendations to the Board of Directors, which makes the final decision and takes the final action.

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[4] The Medical Staff bylaws refer to the Quality Assessment Committee. During the hearing it was consistently referred to as the Quality Assurance Committee.

The Administration supplies staff to support all of the various committees. The Quality Assurance Committee is made up primarily of physicians.[5] It may have one member of the Board of Directors, although it did not during the investigation of the Plaintiff. It may also contain members from the Administration. The Medical Staff members must constitute a majority of the voting members. The Credentials Subcommittee is appointed by the House Committee and is made up of eight physicians representing each of the Hospital departments, one member from the House Committee, and one member of the Administration. In this case, the House Committee member was also a physician. The House Committee is appointed by and made up of members of the Board of Directors. The Board of Directors appoints its own members. It contains representatives from the community, physicians, and the President/CEO, who is a ex officio member.

V

Facts

Plaintiff joined the NCMC staff in August 1989. In 1990 the Quality Assurance Committee received one or more reports of incidents or variances that caused the QA Committee to review a number of medical charts of Plaintiff's patients. The QA Committee initially recommended that Plaintiff be proctored by for a period of time. Dr. Marsh, the proctoring doctor, reported in December of

[5] The vice-chair of each of the hospitals 8 medical departments.

1990 that he felt that Plaintiff was competent to continue without further proctorship. Previously, Dr. Marsh who was head of the Cath Lab, had suspended Plaintiff's Cath Lab privileges. However, the QA Committee continued to have concerns and decided to have an outside review performed. The review, which was conducted by Dr. G. David Jang, was critical of Plaintiff.[6] Following Dr. Jang's report and after giving Dr. Nicholas an opportunity to reply to the report, the QA Committee reported to the Credentials Subcommittee and offered three options:

1. Suspend Dr. Nicholas' invasive cardiology privileges until the resolution of all QA concerns,

2. Enroll Dr. Nicholas in a one-year training course in invasive cardiology at an accredited training program, or,

3. Obtain an independent evaluation from a Colorado cardiologist, Roy Thompson, M.D., to evaluate the appropriateness of onsite proctoring versus formal retraining.

The QA Committee ultimately recommended the third option.

Then, the Credentials Subcommittee met and discussed the report of the QA Committee. Dr. Nicholas was allowed to address the Subcommittee regarding the recommendations and the quality assurance issues. The Subcommittee concluded that allowing Dr. Nicholas to continue with invasive cardiology privileges posed a risk to patient health, safety, and welfare and threatened to

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[6] A copy of Dr. Jang's report was furnished to Dr. Nicholas as soon as it was received.

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interfere with the medical center's ability to provide quality patient care.[7] Based on this conclusion, the Subcommittee directed the president of the Hospital to summarily suspend Dr. Nicholas' invasive cardiology privileges, pending further investigation and review by the Subcommittee. Richard Stenner, the president, notified the Plaintiff of the suspension by letter the same day.

Over the following couple of weeks the Subcommittee interviewed several doctors and nurses and hired three additional doctors to conduct reviews of certain of Dr. Nicholas's patient charts. Those reviews were also critical of Dr. Nicholas. Following receipt of these reports, Dr. Nicholas individually contacted each of the reviewing doctors and represented that because of their reports, his privileges were being revoked. He also furnished information outside of his charts and patient notes. As a result of Dr. Nicholas's contact, the doctors softened their criticisms to some degree.

The Credentials Subcommittee, after receiving Dr. Nicholas's responses to the outside reviews, found that Dr. Nicholas was deficient in a number of categories. Based on those findings, the Credentials Subcommittee determined to suspend Dr. Nicholas's invasive cardiology privileges.

Pursuant to the by-laws and the corrective action plan, Dr. Nicholas was provided with notice of his right to request a Fair Hearing.

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[7] The Subcommittee made a number of factual findings leading up to its conclusion. The record supports the Subcommittee findings and its conclusion.

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Subsequently, a Fair Hearing Panel was appointed and a hearing was held. The Fair Hearing Panel found that Dr. Nicholas had a number of deficiencies. Of particular note, the Panel found:

> 11. Nicholas lacks insight into the purpose and process of creating a valid and useful medical record. He operates under the false impression that detailed dictation of the procedure notes substitutes for current and complete entries in the progress notes. Nicholas' paucity of initial documentation in the progress notes and his constant need to recreate the record in light of new findings leads the panel to the conclusion that he had a definite inability to form a rational treatment plan based on a logical progression of thought. His entries in the progress notes are inadequate to communicate his reasoning and treatment plan without additional information to nurses and other professionals. This continuing deficiency is, in out [sic] opinion, at the root of Nicholas' problems as it causes others to perceive (a) a lack of judgment, (b) a lack of planning or coherent treatment plan, (c) the use of unnecessary or unindicated treatment and (d) unethical behavior.
>
> 17. That Nicholas seems to now recognize his responsibility for any technical and judgmental errors or deficiencies. Nicholas continues, however, to lack insight into his documentation deficiencies and their impact on patient care or interpersonal and interprofessional relationships.
>
> 18. That the summary suspension of the cardiac catheterization laboratory privileges by the Credentials Subcommittee was reasonable and

appropriate in light of the information available to it.

The Hearing Panel then made recommendations that Dr. Nicholas be closely supervised and monitored and that if he continued to evidence deficiencies that his privileges be modified, limited or revoked.

Both Dr. Nicholas and the Credential Subcommittee appealed to the House Committee. The House Committee considered the Report of the Fair Hearing Panel, together with the Credential Subcommittee Report. The record before the Fair Hearing Panel included the Credential Subcommittee's Report, reports from the Quality Assurance Committee, and the reports of Drs. Jang, Greenberg, Molk, and Cohen.

The House Committee determined that the findings of the Fair Hear Panel and those of the Credential Subcommittee, although worded differently were substantially similar.[8] The House Committee agreed with the Credentials Subcommittee that the deficiencies were more serious than perceived by the Fair Hearing Panel and recommended more stringent sanctions. Rather than allowing Dr. Nicholas to continue invasive cardiology under supervision, the House Committee recommended that his invasive privileges be revoked and that he be placed on probation for a year. The recommendation left open the possibility that Dr. Nicholas could re-apply for invasive cardiology privileges. The Board of Directors ratified the House Committee recommendations.

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[8] The House Committee did not find that Dr. Nicholas had been untruthful or that he lacked candor.

VI

Conclusions

As earlier noted, Plaintiff does not challenge any of the actions taken, except the actions of the House Committee and the Board of Directors, which Plaintiff challenges on the basis of procedural errors and noncompliance with the immunity statutes.

I conclude that the policies and by-laws of NCMC substantially comply with both the provisions of CRS 12-36.5-101 et seq. and with 42 USC 11101 et seq. I further conclude that the hospital substantially complied with its by-laws and requirements and with the requirements of both the federal and statute [sic] statutes.

I conclude that the fact members of the House Committee were also members of the Credential Subcommittee does not violate either statute.

A.

I conclude that CRS 12-35.5-105(1) provides immunity from suit for all participants in the professional review process. I conclude and find by a preponderance of the evidence that Karl Gills and Alyce Kantner acted in good faith. The evidence persuades me that their primary concern was the welfare of patients of the hospital. Plaintiff attempts to infer that Ms. Kantner was acting in bad faith because she wanted Dr. Nicholas out of the hospital. It may be true that she wanted Nicholas out, but she was privy to information that would justify that belief. In addition, Plaintiff presented no evidence that she supplied false or misleading information. The evidence about

the "altered film" was not entirely clear. Counsel for Plaintiff seems to assert that Ms. Kantner received a film with blue writing on it. However, Dr. Nicholas testified that he wrote in blue ink on a copy of the film and then made a photocopy of that to deliver to Ms. Kantner. Therefore, the copy Kantner received was entirely black and white. In any event that was not a matter of import in the final analysis.

I'm hard put to find any evidence that Karl Gills did not act in good faith. He may have delivered some documents outside the charts and patient notes to the independent review doctors in Denver, but by itself that is not bad faith. There was more than sufficient evidence to show that Gills and Kantner acted in the reasonable belief that their actions were warranted by the facts.

CRS 12-36.5-105(2) provides immunity "from suit for any damages in a civil or criminal action. . . . " (emphasis added) I reject Plaintiff's argument that this section grants only immunity from liability. The statute is clear, unambiguous and immunity from suit is consistent with the purposes of the statute.

Plaintiff assumes that an appeal from the Fair Hearing Panel is like an appeal from a trial to an appellate court; that the governing board is bound by the facts and conclusions of the Panel and cannot go beyond that. I disagree. The Fair Hearing procedure is to make sure that the Doctor has a full opportunity to develop his position. The Fair Hearing Panel does not make a "decision" that the governing board must either accept or reject. It makes a recommendation. I conclude that the statute leaves to the governing board the ultimate authority as to what

action should be taken. Further, I conclude that in making its decision the Board is not limited to either to [sic] the findings of fact or the recommendation of the Fair Hearing Panel.

In this case, however, the governing board did not reject the findings of the Fair Hearing Panel. Rather, based on those findings, the Board reached a different result. I conclude that while the House Committee and the Board are required to consider the Fair Hearing Panel Report, they are not prohibited from considering other information, so long as Dr. Nicholas had notice and opportunity to respond. Dr. Nicholas had such an opportunity at all stages of the proceedings. I conclude and find by a preponderance of the evidence that the House Committee and the Board acted in good faith. Further, I conclude that they relied on the recommendations of a professional review committee, albeit it [sic] the Credentials Subcommittee, and that there is no evidence that any member had knowledge that made such reliance unwarranted. Further, I find by a preponderance of the evidence that the House Committee and Board acted in the reasonable belief that the action taken was warranted by the facts.

I conclude that the fact that Ken Lind was on the Board of Directors, the House Committee and the Credential Subcommittee does not violate the statutes nor impair the validity of the proceedings.

The parties have devoted some time to whether "good faith" is determined by a subjective or objective test, and who has the ultimate burden of proof. I don't

resolve those issues. Under either a subjective or objective test, and regardless of who has the burden of proof, I find by a preponderance of the evidence that Defendants individually and collectively acted in good faith.[9]

B.

The Federal Act provides immunity for damages for virtually all participants in the peer review process.[10] Immunity under the Federal Act is clearer than under the State statute. If there is compliance with section 1112(a) then the participants are not liable in damages. In addition, no person who supplies information shall be liable unless such information is false and the person providing it knew that such information was false.

Section 11112((a) [sic] requires that the action must be taken:

> (1) in the reasonable belief that the action was in the furtherance of quality health care, (2) after a reasonable effort to obtain the facts of the matter, (3) after adequate notice and hearing procedures are afforded to the physician . . . , (4) in the reasonable belief that the action was warranted by the facts. . . .

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[9] Although I don't decide the issues, my inclination is that good faith under Section 105 of the Colorado Statute means subjective good faith, and that Defendant bears the burden of proving good faith. I believe the standard under the Federal Act is objective good faith and that Plaintiff bears the burden of overcoming the presumption.

[10] As noted, the only claims remaining are damage claims.

Even without the presumption contained in the statute, the evidence establishes by a preponderance of the evidence that Defendants met each of the four criteria. In addition I agree with Defendant that *Bryan v. James E. Homes Regional Medical Center* (11th Cir. 1994) 33 F3d 1318 is directly in point and resolves most, if not all, of Plaintiff's procedural objections.

VII

Summary

Essentially the plaintiff argues that the hospital is not entitled to immunity because (1) the investigatory and adjudicatory functions were intermingled; and, (2) because the House committee and Board considered the reports of the Quality Assurance Committee and the Credentials Subcommittee. As previously noted I find that both the QA Committee and the Credentials Subcommittee meet the requirements of the statute as an authorized Professional Review Committee. Pursuant to CRS 35-5-102 the governing board may "take final action regarding the recommendations of any authorized professional review committee." My view of the statute, as a whole and considering its purposes, is that the Board of Directors may appoint an authorized professional review committee. I believe that the construction is even more clear with regard to the Federal Act and section 203 of the Colorado Act.

In summary, I find that Dr. Nicholas received the minimum procedural and substantive due process rights required by the statutes. I find that the fact that members of the Board and House Committee were also on the

Credentials Subcommittee did not deprive Plaintiff of due process.

By definition the findings and recommendations of the Fair Hearing Panel are not a "decision." The Fair Hearing Panel makes *recommendations*. The "appeal" is not an appeal in the traditional sense in which an appellate court reviews the record and either accepts or rejects a trial court decision. Rather, the House Committee makes a final decision, subject to ratification by the Board of Directors, based on the findings and recommendations of the Fair Hearing Panel. Had the House Committee and Board rejected the findings of the Fair Hearing Panel a different issue would be presented. In this case, however, the House committee accepted the findings. It reached a different result only with regard to the corrective action. This does not impugn good faith.

The Board of Directors has the ultimate responsibility for ensuring that patients receive competent and quality health care (not to mention avoiding potential mal-practice actions). The totality of the evidence persuades me by a preponderance of the evidence that the Board acted in good faith in the interests of the public health and safety.

I conclude that Defendants are immune from liability for damages under the Federal statute. It follows from this that Defendants are immune from liability for damages under §203 of the Colorado Act.

VIII

Judgment and Order

Defendant's Motion for Summary Judgment is granted and this action is dismissed, with prejudice.

IT IS ORDERED:

The trial set to begin October 13, 1998 is vacated.

Plaintiff's Motion to Set Aside Summary Judgment Dismissing Plaintiff's 1983 Claim (11TH Claim) is DENIED.

Plaintiff's Motion to Amend the Finding of the Court's December 4, 1997 and January 17, 1998 Orders is DENIED.

Plaintiff's Motion to Revisit and Reconsider the Defendant's Motion for Summary Judgment is DENIED.

Plaintiff's Motion to Grant Leave to Supplement the Plaintiff's Responses to the Motions and this Motion is DENIED.

Plaintiff's Motion to Defer Final Rulings and Orders until the Hospital has Fully Responded to Outstanding Discovery Requests is DENIED.

Plaintiff's Motion to Grant Partial Summary Judgment in Plaintiff's Favor Concerning the Defendant's 1983 Liability is DENIED.

Defendant's Motion to Strike is DENIED.

Plaintiff's Motion to Fix Time to Respond is MOOT.

All other outstanding motions are either moot or denied.

Dated: June 5, 1998

/s/ William L. West
William L. West
District Judge

ARTICLE 36.5

Professional Review of Health Care Providers

PART I

PROFESSIONAL REVIEW PROCEEDINGS - PHYSICIANS

12-36.5-101. Legislative declaration.

12-36.5-102. Definitions.

12-36.5-103. Use of professional review committees.

12-36.5-104. Establishment of professional review committees – function.

12-36.5-105. Immunity from liability.

12-36.5-106. Committee on anticompetitive conduct.

PART 2

CONFORMANCE WITH FEDERAL LAW AND REGULATION

12-36.5-201. Legislative declaration.

12-36.5-202. Rules and regulations – compliance with reporting requirements of federal act.

12-36.5-203. Limitations on liability relating to professional review actions.

PART I

PROFESSIONAL REVIEW PROCEEDINGS - PHYSICANS

12.36.5-101. Legislative declaration. (1) The general assembly hereby finds, determines, and declare that the

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Colorado state board of medical examiners created pursuant to article 36 of this title acts for the state in its sovereign capacity to govern licensure, discipline, and professional review of persons licensed to practice medicine in this state. The general assembly further finds, determines, and declare that the authority to practice medicine in this state is a privilege granted by the legislative authority of the state and that it is necessary for the health, safety, and welfare of the people of this state that the board of medical examiners exercise its authority to protect the people of this state from the unauthorized practice of medicine and from unprofessional conduct by persons licensed to practice medicine under article 36 of this title.

(2) The general assembly recognizes that: Many patients of persons licensed to practice medicine in this state have restricted choices of physicians under a variety of circumstances and conditions; many patients lack the knowledge, experience, or education to properly evaluate the quality of medical practice or the professional conduct of those licensed to practice medicine; and it is necessary and proper that the board of medical examiners exercise its regulatory authority to protect the health, safety, and welfare of the people of this state.

(3) The general assembly recognizes that, in the proper exercise of its authority and responsibilities under this article, the board of medical examiners must, to some extent, replace competition with regulation and that such replacement of competition by regulation particularly with regard to physicians, is related to a legitimate state interest in the protection of the health, safety, and welfare of the people of this state.

12-36.5-102. Definitions. As used in this article, unless the context otherwise requires:

(1) "Board of medical examiners" means the Colorado state board of medical examiners created pursuant to section 12-36-103.

(2) "Governing board" means any board, board of trustees, governing board, or other body, or duly authorized subcommittee thereof, of any organization of health care providers, which board or body has final authority pursuant to such organization's written bylaws, policies, or procedures to take final action regarding the recommendations of any authorized professional review committee.

(3) "Professional review committee" means any committee authorized under the provisions of this article to review and evaluate the professional conduct of and the quality and appropriateness of patient care provided by any physician licensed under article 36 of this title.

(4) "Records" means any and all written or verbal communications by any person, any member of an investigative body, or any professional review committee or governing board, or the staff thereof, arising from any activities of a professional review committee authorized by this article, including the complaint, response, correspondence related thereto, recordings or transcripts of proceedings, minutes, formal recommendations, decisions, exhibits, and other similar items or documents typically constituting the records of administrative proceedings.

12-36.5-103. Use of professional review committees. (1) The general assembly recognizes that the board of medical examiners, while assuming and retaining ultimate authority for licensure and discipline in accordance with article 36 of this title and in accordance with this article, cannot practically and economically assume responsibility over every single allegation or instance of purported deviation from the standards of quality for the practice of medicine, from the standards of professional conduct, or from the standards of appropriate care and that an attempt to exercise such oversight would result in extraordinary delays in the determination of the legitimacy of such allegations and would result in the inappropriate and unequal exercise of its authority to license and discipline physicians. It is therefore the intent of the general assembly that the board of medical examiners utilize and allow professional review committees and governing boards to assist it in meeting its responsibilities under article 36 of this title and under this article.

(2) All physicians are encouraged to serve upon such professional review committees when called to do so and to study and review in good faith the professional conduct of physicians, including the quality and appropriateness of patient care.

(3)(a) The use of professional review committees is declared to be an extension of the authority of the board of medical examiners. However, except as otherwise provided in this article, nothing in this article shall limit the authority of professional review committees properly constituted under this article.

(b) Professional review committees, the members who constitute such committees, governing boards, and persons who participate directly or indirectly in professional review proceedings are granted certain immunities from liability arising from actions which are within the scope of their activities and taken in good faith as provided in section 12-36.5-105. Such grants of immunity from liability are declared to be necessary to ensure that professional review committees and governing boards can exercise their professional knowledge and judgment.

12-36.5-104. Establishment of professional review committees – function. (1) A professional review committee may be established pursuant to this section to review and evaluate the quality and appropriateness of patient care provided by and the professional conduct of any physician licensed under article 36 of this title.

(2) Persons licensed to practice medicine under article 36 of this title who are actively engaged in the practice of medicine in this state shall constitute a majority of any professional review committee established pursuant to this section, except for those boards authorized by paragraph (g) of subsection (4) of this section.

(3) A utilization and quality control peer review organization, as defined pursuant to 42 U.S.C. sec. 1320c-1, or any other organization performing similar review services under federal or state law shall be an approved professional review committee under this article.

(4) Any professional review committee established by any of the following organizations, entities, or professional societies shall be an approved professional review committee under this article if it operates pursuant to written bylaws, policies, or procedures which are in compliance with this article and which have been approved by its governing board:

(a) The medical staff of a hospital licensed pursuant to part 1 of article 3 of title 25, C.R.S., or certified pursuant to section 25-1-107 (1)(l)(II), C.R.S.;

(b) The medical staff of a hospital-related corporation. For the purposes of this paragraph (b), a corporation is "hospital-related" if the licensed or certified hospital or holding company of such hospital has ownership or control of such corporation.

(c) A society or association of physicians whose membership includes not less than one-third of the doctors of medicine or doctors of osteopathy licensed to practice and residing in this state, if the physician whose services are the subject of the review is a member of such society or association;

(d) A society or association of physicians licensed to practice and residing in this state and specializing in a specific discipline of medicine, whose society or association has been designated by the board of medical examiners as the specialty society or association representative of physicians practicing such specific discipline of medicine, if the physician whose services are the subject of the review is a member of such specialty society or association;

(e) An individual practice association or a preferred provider organization comprised of at least twenty-five physicians or a medical group which predominantly serves members of a health maintenance organization licensed pursuant to article 17 of title 10, C.R.S. A professional review committee established pursuant to this paragraph (e) shall have jurisdiction to review only physicians who are members of the association or organization creating and authorizing that committee; except that such professional review committee may review the care provided to a particular patient referred by a member of such association or organization to another physician who is not a member of such association or organization.

(f) A Colorado corporation authorized to insure physicians pursuant to article 3 of title 10, C.R.S., or any other corporation authorized to insure such physicians in this state when designated by the board of medical examiners under subsection (5) of this section;

(g) Governing boards of any entity which has a professional review committee established pursuant to article 36 of this title;

(h) Any peer review committee established or created by a combination or pooling of any of the organizations authorized by this section to have a professional review committee;

(i)(I) A nonprofit corporation or association comprised of representatives from a statewide medical society and a statewide hospital association. Such association shall be comprised of physicians, hospital administrators, and hospital trustees, with a majority of such representatives being physicians. The association may establish, or

contract for, one or more peer review committees to review the care by hospital staff physicians, with priority given to small rural medical staffs. Such peer review services shall be available statewide on a fee-for-service basis to licensed or certified hospitals at the joint request of the governing body and the medical staff of the hospital or at the sole request of the governing body of the hospital. If a physician being reviewed specializes in a generally recognized specialty of medicine, at least one of the physicians on the peer review committee shall be a physician practicing such specialty.

(II) For purposes of the introductory portion to this subsection (4), the bylaws, policies, and procedures shall be in compliance with this article and be approved by the nonprofit corporation or association.

(5) The board of medical examiners may establish by rule or regulation procedures necessary to authorize other health care or physician organizations or professional societies to establish professional review committees.

(6) a professional review committee acting pursuant to this part I may investigate or cause to be investigated: The qualifications of any physician licensed under article 36 of this title who seeks to subject himself to the authority of any organization, entity, or professional society listed in subsection (4) of this section; or the quality or appropriateness of patient care rendered by or the professional conduct of any physician licensed under article 36 of this title who is subject to the authority of such organization, entity, or professional society. Such investigation shall be conducted in conformity with written bylaws,

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policies, or procedure adopted by such organization, entity, or professional society.

(7) The written bylaws, policies, or procedures of any professional review committee shall provide for at least the following:

(a) If the findings of any investigation indicate that the physician who is the subject of the investigation is lacking in qualifications, has provided substandard or inappropriate patient care, or has exhibited inappropriate professional conduct, the professional review committee shall hold a hearing, unless the physician waives his right to a hearing, to consider the findings: except that, if the professional review committee is submitting its findings to another professional review committee for review, only one hearing shall be necessary prior to any appeal before the governing body.

(b) Any person who has participated in the course of any investigation shall be disqualified as a member of the committee at any hearing held pursuant to paragraph (a) of this subsection (7), but such person may participate as a witness in such hearing.

(c) The physician who is the subject of any investigation shall be given reasonable notice of such hearing and shall have a right to be present, to be represented by legal counsel at such hearing, and to offer evidence in his own behalf.

(d) After such hearing, the professional review committee shall make any recommendations it deems necessary to the governing board unless provided by federal law or regulation.

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(e) A copy of such recommendations shall be given to the subject physician who then shall have the right to appeal the findings and recommendations of the professional review committee to the governing board to which the recommendations are made.

(8)(a) All governing boards shall adopt written bylaws, policies, or procedures which provide that a physician who is the subject of an adverse recommendation by a professional review committee may appeal to the governing board. Such bylaws, policies, or procedures shall provide that the physician shall be given reasonable notice of his right to appeal and, unless waived by the physician, shall have the right to appear before the governing board, to be represented by legal counsel, and to offer such argument on the record as he deems appropriate.

(b) The bylaws may provide that a committee of not fewer than three members of the governing board may hear the appeal. Such bylaws may also allow for an appeal to be heard by an independent third party designated by the board.

(9) All governing boards which are required to report their final actions to the board of medical examiners are not otherwise relieved of such obligations by virtue of any provision of this article.

(10)(a) The records of a professional review committee, a governing board, or the committee on anticompetitive conduct shall not be subject to subpoena or discovery and shall not be admissible in any civil suit brought against a physician who is the subject of such records.

(b) Notwithstanding the provisions of paragraph (a) of this subsection (10), such records shall be subject to subpoena and available for use:

(I) By the committee on anticompetitive conduct;

(II) By either party in any appeal or de novo proceeding brought pursuant to this part 1;

(III) By a physician in a suit seeking judicial review of any action by the governing board;

(IV) By a governing board seeking judicial review.

(11) At the request of the board of medical examiners, a governing board shall provide the board of medical examiners with the complete record of all professional review proceedings, including, but not limited to, the findings, recommendations, and actions taken.

(12) Investigations, examinations, hearings, meetings, or any other proceedings of a professional review committee or governing board conducted pursuant to the provisions of this part 1 shall be exempt from the provisions of any law requiring that proceedings he conducted publicly or that thc minutes or records be open to public inspection.

(13) All proceedings, recommendations, records, and reports involving professional review committees or governing boards shall be confidential.

(14) a professional review committee or governing board which is constituted and conducts its reviews and activities pursuant to the provisions of this part I is

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declared not to be an unlawful conspiracy in violation of section 6-4-102, C.R.S.

12-36.5-105. Immunity from liability. (1) A member of a professional review committee, a witness before a professional review committee, or any person who files a complaint or otherwise participates in the professional review process shall be immune from suit in any civil or criminal action, including antitrust actions, brought by a physician who is the subject of the review by such professional review committee, if such member made a reasonable effort to obtain the facts of the matter as to which he acted, acted in the reasonable belief that the action taken by him was warranted by the facts, and otherwise acted in good faith within the scope of such professional review committee process and if such witness or participant acted in good faith within the scope of such professional review committee process.

(2) The governing board, the individual members of such board, and the entity which has established a peer review committee pursuant to section 12-36.5-104 shall be immune from suit for any damages in a civil or criminal action, including antitrust actions, brought by a physician who is the subject of any action taken by such board or members if such board or its members, acting as individuals, act in good faith. Good faith shall include reliance upon the recommendations of the review committee, but good faith shall not be presumed if the board or a member has knowledge concerning the review in question which would cause such reliance to be unwarranted.

Good faith shall also require that the board otherwise acted in good faith, including the consideration of any facts not previously available to and considered by the peer review committee, and that the board acted in reasonable belief that the action taken was warranted by the facts.

12-36.5-106. Committee on anticompetitive conduct. (1) There shall be established a permanent, independent committee of the board of medical examiners to be known as the committee on anticompetitive conduct referred to in this section as "the committee".

(2) The committee shall be composed of five persons, none of whom shall be a member of the board of medical examiners. Four members of the committee shall be licensed to practice medicine and actively engaged in the practice of medicine in this state and shall be appointed by the board of medical examiners. No member shall practice in the same medical subspeciality as any other member nor conduct his primary practice in the same county as any other member. One member shall be appointed by the governor and shall be an attorney licensed to practice in this state who has particular expertise and experience in the area of antitrust law.

(3) Each member of the committee shall serve for a term of three years and may be reappointed for one additional term. The initial committee shall be appointed as follows: Two members, including the attorney member, for terms of three years; two members for terms of two

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years; and one member for a term of one year. All subsequent appointments shall be for terms of three years.

(4) Any member of the committee may be removed by his appointing authority for neglect of duty, incapacity, or misconduct. Any vacancy shall be filled by the appointing authority for the remainder of the vacated term.

(5) The committee shall annually elect a chairman from among its members. Any three members of the committee shall constitute a quorum. Any action of a majority of those present comprising such quorum shall be the action of the committee. Committee members shall be compensated as provided in section 24-34-102(13), C.R.S. The committee may, in its discretion, utilize the expertise of consultants, including, but not limited to, legal, medical, and business specialists. The costs of such consultants shall be assessed and collected as provided in subsection (11) of this section.

(6) The committee shall adopt procedural rules, including emergency rules, pursuant to the rule-making provisions of the "State Administrative Procedure Act", article 4 of title 24, C.R.S., including rules related to the disqualification of a committee member, which rules shall be guided by section 24-4-105(1), C.R.S.

(7) Any physician who is the subject of a final action by a governing board, which action results in the denial, termination, or restriction of privileges at or membership in or participation in an organization, and who believes that such action resulted from unreasonable anticompetitive conduct shall have, as his sole and exclusive remedy, direct review of the record by the committee.

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Such review shall be limited to the sole issue of whether such final board action resulted from unreasonable anti-competitive conduct. Failure to exhaust this administrative remedy before the committee shall preclude the right of de novo review on the merits of the issue of unreasonable anticompetitive conduct.

(8) Nothing in this article shall preclude a physician or health care provider otherwise aggrieved by the final action of a governing board from seeking other remedies available to them by law, except as provided in subsection (7) of this section.

(9) Review by the committee shall be in accordance with the following procedures and, to the extent practicable, in accordance with the procedures used in the district courts of this state:

(a) Review shall be initiated by filing a verified complaint with the committee, no later than thirty days after receipt of a notice of final action by the governing board, alleging, with specificity, all facts disclosed in the record and all additional facts known to the complainant which would support his allegation that the final action taken by the governing board resulted from unreasonable anticompetitive conduct.

(b) The committee shall mail a copy of such complaint to the governing board and the professional review committee by certified mail, return receipt requested, within five days of the receipt of such complaint by the committee, advising them of their right to file a verified answer to the allegations stated therein. Receipt of such complaint by mail shall make the recipients thereof a party to these proceedings.

(c) The governing board and professional review committee shall have thirty days after receipt of the complaint to file their verified answer.

(d) Within thirty days of receipt of the complaint, unless the committee, for good cause shown, extends the time period not to exceed an additional thirty days, the committee shall determine whether the complaint alleges sufficient facts which, if true, would substantiate a finding of probable cause that the final action taken by the governing board resulted from unreasonable anticompetitive conduct.

(e) If the committee finds no such probable cause exists, it shall dismiss the complaint, which dismissal shall constitute final administrative action.

(f) If the committee finds such probable cause exists, it shall schedule a hearing. At such hearing the committee shall review the record below on the sole issue of whether the final action of the governing board resulted from unreasonable anticompetitive conduct and shall take evidence only with regard to the additional facts specifically alleged in the complaint or answer regarding unreasonable anticompetitive conduct, except when, in the discretion of the committee, the interests of a fair hearing demand otherwise.

(g) The attendance of witnesses and the production of books, patient records, papers, and other pertinent documents at the hearing may be summoned by subpoenas issued by the chairman of the committee or his designee, which shall be served in the manner provided by the Colorado rules of civil procedure for service of

subpoenas. Any subpoena issued pursuant to this paragraph (g) shall be enforceable in the district court.

(h) No evidentiary hearing shall last more than eight hours, unless the committee, in its discretion, determines that additional time is necessary in the interests of a fair hearing. Except as provided otherwise in this section, any evidentiary hearing shall be conducted in accordance with section 24-4-105(4) and (7), C.R.S.

(i) An evidentiary hearing shall be scheduled within a reasonable time after a finding that probable cause exists.

(j) Within a reasonable time after the completion of its hearing, the committee shall issue its written findings and final order.

(k) If the committee finds by a preponderance of evidence that the final action of the governing board resulted from unreasonable anticompetitive conduct, it shall issue its final order disapproving and setting aside such action or modifying the action taken by the governing board in whole or in part, which final order shall be binding on the parties. A copy of such order shall be mailed by certified mail, return receipt requested, to the parties.

(l) If the committee fails to find that the final action of the governing board resulted from unreasonable anticompetitive conduct as provided in paragraph (k) of this subsection (9), it shall issue its order dismissing the complaint, and the final action of the governing board shall stand.

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(m) If the committee finds that the record of the governing board is insufficient to permit the committee to reach appropriate findings with regard to unreasonable anticompetitive conduct, it may remand the case for further review by the governing board.

(n) In any case presented to the committee where the medical practice of the complainant constitutes a clear and present danger to patients, the committee shall refer the case to the board of medical examiners for such action as the board deems appropriate.

(10)(a) Following final administrative action by the committee, such action of the committee may be reviewed only by the court of appeals through appropriate proceedings brought pursuant to section 24-4-106(11), C.R.S.

(b) Following final administrative action by the committee, any party aggrieved by the final action of a governing board who wishes to challenge the action of such governing board, rather than the committee's review of such action, shall have the right to seek de novo review on the merits in a district court in Colorado. In no event shall the board of medical examiners or the committee be made parties to such a district court action.

(c) As a condition of filing a complaint under paragraph (a) of subsection (9) of this section, the complainant shall post a cash bond or equivalent liquid security of three thousand dollars to cover anticipated costs which may be assessed against him. Within thirty days of receipt of service of a complaint on a governing board, or concurrently with the filing of an answer, whichever is earlier, the governing board shall post a cash bond or equivalent liquid security of three thousand dollars to

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cover anticipated costs which may be assessed against it as a party. The committee may enforce this latter requirement through the district court.

(11) The committee shall assess and collect all costs associated with its activities, including attorney fees incurred by the committee, the per diem and reasonable expenses of each committee member, and other reasonable expenses, from the losing party or as the committee deems appropriate.

(12) The committee shall promulgate such rules and regulations as may be necessary for the implementation of this section, including mechanisms to secure the payment of costs as provided in paragraph (c) of subsection (10) and subsection (11) of this section.

(13) any member of the committee shall be immune from suit in any civil action based upon any proceedings or other official actions performed in good faith. Any witness, consultant, or staff member participating in good faith in the making of a report or any person participating in good faith in any investigative or administrative proceeding pursuant to this section shall also be immune from suit in any civil action.

PART 2

CONFORMANCE WITH FEDERAL LAW AND REGULATION

12-36.5-201. Legislative declaration. The general assembly hereby finds, determines, and declares that the

enactment of this part 2 is necessary in order for the state to comply with the provisions of the federal "Health Care Quality Improvement Act of 1986", as amended. It is the intent of the general assembly that the provisions of this part 2 are to be interpreted as being complementary to the provisions of part 1 of this article. The provisions of this part 2 are intended to be responsive to specific requirements of the federal "Health Care Quality Improvement Act of 1986", as amended. If the provisions of this part 2 conflict with the provisions of part 1 of this article, other than with respect to the specific requirements of the federal "Health Care Quality Improvement Act of 1986", as amended, the provisions of part 1 of this article shall prevail.

12-36.5-202. Rules and regulations – compliance with reporting requirements of federal act. Upon implementation of the federal "Health Care Quality Improvement Act of 1986", as amended, 42 U.S.C. secs. 11101 through 11152, and upon implementation of the federal data bank, the board of medical examiners shall promulgate rules and regulations to comply with such act, which rules and regulations are consistent with the standards and the reporting requirements of such act.

12-36.5-203. Limitations on liability relating to professional review actions. (1) The following persons shall not be liable for damages in any civil action with

respect to their participation in, assistance to, or reporting of information to a professional review body in connection with a professional review action in this state, and such persons shall not be liable for damages in any civil action with respect to their participation in, assistance to, or reporting of information to a professional review body which meets the standards of and is in conformity with the provisions of the federal "Health Care Quality Improvement Act of 1986", as amended, 42 U.S.C. secs. 11101 through 11152, upon implementation of such act by the federal government:

(a) The professional review body;

(b) any person acting as a member of or staff to the professional review body;

(c) any person under a contract or other formal agreement with the professional review body;

(d) any person who participates with or assists the professional review body with respect to the professional review action.

(2) Notwithstanding any other provision of law, no person, whether as a witness or otherwise, who provides information to a professional review body regarding the competence or professional conduct of a physician shall be held, by reason of having provided such information, liable in damages in any civil action unless such information is false and the person providing it knew that such information was false.

(3) For the purposes of this section, unless the context otherwise requires:

(a) "Professional review action" means an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity and which is based on the competence or professional conduct of an individual physician, which conduct affects or may affect adversely the clinical privileges of or membership in a professional society of the physician. "Professional review action" includes a formal decision by the professional review body not to take an action or make a recommendation as provided in this paragraph (a) and also includes professional review activities relating to a professional review action. an action shall not be considered to be based upon the competence or professional conduct of a physician if the action is primarily based on:

(I) The physician's association or lack of association with a professional society or association;

(II) The physician's fees or his advertising or engaging in other competitive acts intended to solicit ore retain business;

(III) The physician's association with, supervision of, delegation of authority to, support for, training of, or participation in a private group practice with a member or members of a particular class of health care practitioners or professionals;

(IV) The physician's participation in prepaid group health plans, salaried employment, or any other manner of delivering health services whether on a fee-for-service basis or other basis;

(V) Any other matter that does not relate to the competence or professional conduct of a physician.

(b) "Professional review body" means a health care entity and the governing body or any committee of a health care entity which conducts professional review actions and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity.

DISTRICT COURT, WELD COUNTY, COLORADO

Case No. 92 CV 447, Division I

AFFIDAVIT OF RICHARD H. STENNER, PRESIDENT, NORTH COLORADO MEDICAL CENTER

WILLIAM JOHN NICHOLAS,
Plaintiff,

vs.

NORTH COLORADO MEDICAL CENTER, a Colorado not for profit corporation, and the GOVERNING BOARD OF THE NORTH COLORADO MEDICAL CENTER,
Defendants.

STATE OF COLORADO)
) ss
COUNTY OF WELD)

COMES NOW, Richard H. Stenner, after being first duly sworn and upon his oath, states as follows:

1. That I am Richard H. Stenner, President of North Colorado Medical Center, Inc.

2. That North Colorado Medical Center, Inc., is a private not for profit corporation created and operating under the laws of the State of Colorado.

3. That North Colorado Medical Center, Inc., is a tax exempt organization pursuant to the provisions of § 501(c)(3) of the Internal Revenue Code of 1986, as amended; its real and personal property are exempt from taxation pursuant to C.R.S. §§ 39-3-108, 39-3-109, as

amended; and its income is exempt from state taxation pursuant to C.R.S. § 39-22-112, as amended.

4. That North Colorado Medical Center, Inc. has no membership and is managed by a self-perpetuating Board of Directors of not less than eleven nor more than thirteen persons, four of whom are selected by the Board of Directors from the Board of Trustees of North Colorado Medical Center.

5. That the hospital facility is owned by Weld County, Colorado, which manages the property through the Board of Trustees of North Colorado Medical Center, which consists of seven members appointed by the Weld County Commissioners. North Colorado Medical Center, Inc. leases the hospital facility from the Board of Trustees pursuant to C.R.S. § 25-3-313.

6. That neither the State of Colorado nor any political subdivision thereof manages or controls the internal operations of North Colorado Medical Center, Inc.

7. That North Colorado Medical Center, Inc., owns all of the equipment and supplies and employs all of the personnel necessary and convenient to the operation of the hospital.

8. That North Colorado Medical Center, Inc., does not receive any tax funds or support from the State of Colorado or any of its political subdivisions.

NORTH COLORADO MEDICAL CENTER, INC.

By Richard H. Stenner
Richard H. Stenner, President

Subscribed and sworn to before me this 22nd day of January, 1993, by Richard H. Stenner, President of North Colorado Medical Center, Inc.

WITNESS my hand and official seal.

My commission expires: My commission expires Mar. 11, 199[Illegible]

/s/ [Illegible]
Notary Public